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IN THE

SUPREME COURT OF THE UNITED STATES

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SUPREME COURT, U.S.

OCTOBER TERM, 1975

No. 75-442

JOHN H. POELKER, Mayor of the City of St. Louis, Missouri,
and
R. DEAN WOCHNER, M.D., Director of Health and Hospitals, and Acting Commissioner of Hospitals of the City of St. Louis, Missouri,
Petitioners,

vs.

JANE DOE, and a Class,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

JACK L. KOEHR
City Counselor of the City of St. Louis, State of Missouri
EUGENE P. FREEMAN
Deputy City Counselor of the City of St. Louis, State of Missouri
Room 314, City Hall
1200 Market Street
St. Louis, Missouri 63103
314-453-3366
Attorneys for Petitioners

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

40

INDEX

	Page
Opinions Below	2
Statement of Jurisdiction	3
Questions Presented for Review	3
Positive Law Provisions Involved	4
Statement of the Case	10
Jurisdiction Below	10
Facts Material to Questions Presented	10
Reasons for Granting a Writ of Certiorari	23
I. Abortion on Demand	23
II. Appellate Abuse of Discretion	27
1. Overturning District Court's Findings	27
2. Court of Appeals Initiation of Petitioner Mayor's Convictions of "Bad Faith" and Imposition of Punishment by Levying "Attorney Fees"	33
III. Justiciability, Standing and Mootness	39
Conclusion	53

Appendices

District Court Memorandum and Order, filed March 22, 1974, with "Exhibit 1"	A-1
Court of Appeals Opinion, filed June 4, 1974	A-11
Court of Appeals Order, denying petition for rehearing and rehearing en banc, entered June 27, 1974	A-18

District Court Memorandum and Order, filed January 13, 1975 ..... A-19

Court of Appeals Opinion, filed April 14, 1975 ..... A-27

Court of Appeals Order, denying petition for rehearing and for rehearing en banc, and in response to motion for rehearing en banc, modifying opinion filed April 14, 1975, entered May 7, 1975 ..... A-40

Court of Appeals Order, in response to motion of appellees, amending opinion filed April 14, 1975, as revised by order of May 7, 1975, and granting appellees right to file a second petition for rehearing and rehearing en banc entered June 2, 1975, with opinion by Van Oosterhout, senior Circuit Judge, concurring in part and dissenting in part A-44

Court of Appeals Order, denying second petition for rehearing and rehearing en banc, entered June 24, 1975 A-54

District Court Order, entering judgment on mandate of Court of Appeals issued July 8, 1975, pursuant to opinion filed April 14, 1975, as modified on May 7, 1975, and June 2, 1975, entered August 8, 1975 ..... A-55

District Court Memorandum and Order, filed August 8, 1975 ..... A-56

Notice of Appeal of Jane Doe, et al., plaintiffs, filed August 14, 1975 ..... A-60

Court of Appeals Clerk's acknowledgement of filing of Appeal, dated August 22, 1975, and notice of probable hearing October 13, 1975, in St. Paul, Minnesota A-62

Charter of the City of Saint Louis, Missouri, Table of Contents A-65

Article XVIII, Civil Service, of the Charter of the City of St. Louis A-67

TABLE OF AUTHORITIES CITED

Cases

Abele v. Markle, 452 F2d 1121 (C.A. 2nd 1971) 49

Alyeska Pipeline Service Co. v. Wilderness Society, — U.S. —, 95 S.Ct. 1612, 44 L.Ed.2d 141 (S.Ct. 1975) 34, 38

Bailey v. Patterson, 369 US 31 (S.Ct. 1962) 46

Baker v. Carr, 369 US 186 (S.Ct. 1962) 45

Barlow v. Collins, 397 US 159 (S.Ct. 1970) 50

Birdwell v. Hazelwood School District, 491 F2d 490 (C.A. 8th, 1974) 33

Commissioner of Internal Revenue v. Duberstein, 363 US 278 (S.Ct. 1960) 32

Crossen v. Breckenridge, 446 F2d 833 (C.A. 6th, 1971) .. 50

Doe v. Bolton, 410 US 179 (S.Ct. 1973) 24, 25, 27, 35, 37

Doe v. Poelker, 497 F2d 1063 (C.A. 8th, 1974) 31

Doe v. Poelker, 515 F2d 541 (C.A. 8th, 1975) 26, 27

Flast v. Cohen, 392 US 83 (S.Ct. 1968) 41

Golden v. Zwickler, 394 US 103 (S.Ct. 1969) 42, 44, 45

Indiana Employment Division v. Burney, 409 US 540 (S. Ct. 1973) 46

Linda R.S. v. Richard D., 410 US 614 (S.Ct. 1973) 46

North Carolina v. Rice, 404 US 244 (S.Ct. 1971) 45

Parke-Davis and Co. v. Stromsodt, 411 F2d 1390 (C.A. 8th, 1969) 33

Pendergrass v. New York Life Insurance Co., 181 F2d 136 (C.A. 8th, 1950) 32

Poe v. Menghini, 339 F. Supp. 986 (D. Kan. 1972) 51

Roe v. Ferguson, — F2d —, April 28, 1975, No. 74-2195 (C.A. 6th, 1975) 36

Roe v. Norton, — F2d —, July 31, 1975, No. 74-1874 (C.A. 2nd, 1975) 37

Roe v. Wade, 410 U.S. 113 (S.Ct. 1973) 24, 25, 27, 35, 37, 45, 46, 47, 48, 49, 50, 51, 52

Toledo Scale Co. v. Computing Scale Company, 261 US 399 (S.Ct. 1923) 39

Traux v. Raich, 239 US 33 (S.Ct. 1915) 51

United Public Workers v. Mitchell, 330 US 75 (S.Ct. 1947) 40

United States v. Raines, 362 US 17 (S.Ct. 1960) 41

United States v. 12 200-Ft. Reels, 413 U.S. 123 (S.Ct. 1972) 38

United States v. United States Gypsum Co., 333 US 364 (S.Ct. 1948) 32

United States v. Vuitch, 402 US 62 25

Universal Oil Products Co. v. Root Refining Co., 328 US 575 (S.Ct. 1964) 38, 39

Vaughan v. Atkinson, 369 US 527 (S.Ct. 1962) 39

Word v. Poelker, 495 F2d 1349 (C.A. 8th, 1974) 35, 37

Wulff v. Singleton, 508 F2d 1211 (C.A. 8th, 1974), cert. gr. 43 LW 3674, June 24, 1975 .....35, 36, 37

Statutes and Court Rules

Charter of the City of St. Louis, Article XVIII 24

Federal Rules of Civil Procedure, Rule 52(a) ...28, 29, 32, 33

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JANE DOE, and a Class,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

The petitioners John H. Poelker and R. Dean Wochner, respectfully pray that a writ of *certiorari* issue to review the judgments and opinions of the United States Court of Appeals for the Eighth Circuit entered in the proceedings between these petitioners and respondent in such court.[1]

[1] For simplicity, the parties are throughout identified by their present status of petitioners and respondent.

OPINIONS BELOW

A. There are three Memoranda and Orders of the United States District Court, Eastern District, Eastern Division, which at this date, through publisher's oversight and recency are not yet reported. However, each is herewith presented in the separate Appendix; these are:

1. *Jane Doe, et al. v. John H. Poelker, Mayor of the City of St. Louis, Missouri, et al.*, Case No. 73C-565(A), entered on March 22, 1974;

2. *Jane Doe, et al. v. John H. Poelker, Mayor of the City of St. Louis, Missouri, et al.*, Case No. 73C-565(A), entered on January 13, 1975; and

3. *Jane Doe, et al. v. John H. Poelker, Mayor of the City of St. Louis, Missouri, et al.*, Case No. 73C-565(A), entered on August 8, 1975.

B. There is an opinion of the Court of Appeals for the Eighth Circuit entered on June 4, 1974, reversing the District Court in A-1 above, reported officially as *Jane Doe, et al. v. John H. Poelker, etc., et al.*, 497 F.2d 1063. This opinion is included in the Appendix.

C. There is an opinion of the Court of Appeals for the Eighth Circuit filed April 14, 1975, reversing the District Court in A-2 above: there are also two substantial modifications of this opinion by subsequent orders entered: May 7, 1975, and June 2, 1975. The case is reported as *Jane Doe, et al. v. John H. Poelker, etc., et al.*, 515 F.2d 541, as the opinion finally evolved after the modifications. The opinion and each successive opinion modifying order are included in the Appendix.

JURISDICTION

A final judgment dated and entered by the Court of Appeals on April 14, 1975, is sought to be reveiwed.

The Court of Appeals entered an interlocutory judgment reversing a judgment of the District Court and remanding the case for trial on June 4, 1974. Timely petitions for rehearing and rehearing *en banc* were denied by the Court of Appeals' order made on June 27, 1974.

A final judgment of the Court of Appeals, reversing the District Court and remanding for limited purposes was dated and filed on April 14, 1975. Timely petitions for rehearing and rehearing *en banc* were denied by the Court of Appeals' order of May 7, 1975; and such order, in response to said petitions, substantially modified the opinion and judgment of April 14, 1975. Upon petitioners' timely motion for further amendment of the opinion and judgment as modified, the Court of Appeals again substantially modified its opinion and judgment on June 2, 1975, and granted petitioners the right to file second petitions for rehearing and rehearing *en banc*. Timely second petitions for rehearing and rehearing *en banc* were filed and denied by the Court of Appeals' order entered on June 24, 1975.

The Supreme Court's sound judicial discretion for issuance of a writ of *certiorari* is invoked under its jurisdiction conferred by 28 U.S.C. Section 1254(1). This petition for certiorari was filed within 90 days of the effective date of the judgment, June 24, 1975.

QUESTIONS PRESENTED FOR REVIEW

1. Whether a woman's Federal constitutional privacy rights regarding abortion requires a municipally staffed and operated hospital to furnish medical personnel and facilities to comply

with her request for an abortion based on her financial distress within her first trimester of pregnancy where no medical indications exist.

2. Whether the Fifth Amendment Due Process Clause of the United States Constitution and Rule 52(a) of the Federal Rules of Civil Procedure prohibit a Court of Appeals from finally reversing a District Court's well-found findings and substituting its own contrary Complaint constructions and factual conclusions, and then, for the first time, on such appeal relying thereon, levying punitive substantial "attorney fees" for "bad faith," without there having occurred any trial of any of such issues or conclusions in the District Court.

3. Whether Article III of the Federal Constitution requiring a case or controversy bars a Court of Appeals' judgment in favor of a woman pregnant at the time of filing suit for personal relief, and as sole representative of a class, claiming a constitutional right to an hysterectomy and an abortion by a municipality, where she secretly procures an abortion within five (5) days of filing and prior to summons of one defendant and before the case is heard by the District Court.

POSITIVE LAW PROVISIONS INVOLVED

The Constitution of the United States

Article III:

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation,

which shall not be diminished during their Continuance in Office.

Section 2. The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime jurisdiction;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Land under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Amendments to the United States Constitution:

First Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment, providing in applicable part:

* * * nor be deprived of life, liberty, or property, without due process of law;

Seventh Amendment:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Ninth Amendment:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Tenth Amendment:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The Constitution of the State of Missouri, 1945

Article I, Bill of Rights

In order to assert our rights, acknowledge our duties, and proclaim the principles on which our government is founded, we declare:

* * * * * * * *

Section 2. Promotion of general welfare—natural rights of persons—equality under the law—purpose of government. That all constitutional government is intended to promote the general welfare of the people; that all persons have a natural right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry; that all persons are created equal and are entitled to equal rights and opportunity under the law; that to give security to these things is the principal office of government, and that when government does not confer this security, it fails in its chief design.

* * * * * * * *

Section 5. Religious freedom—liberty of conscience and belief—limitations. That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no human authority

can control or interfere with the rights of conscience; that no person shall, on account of his religious persuasion or belief, be rendered ineligible to any public office of trust or profit in this state, be disqualified from testifying or serving as a juror, or be molested in his person or estate; but this section shall not be construed to excuse acts of licentiousness, nor to justify practices inconsistent with the good order, peace or safety of the state, or with the rights of others.

Missouri Statutory Provisions

Section 197.032, Revised Statutes of Missouri, Laws 1973.

197.032. Hospitals and medical personnel may refuse abortions—no denial of public benefits for such refusal—civil action, when

1. No physician or surgeon, registered nurse, practical nurse, midwife or hospital, public or private, shall be required to treat or admit for treatment any woman for the purpose of abortion if such treatment or admission for treatment is contrary to the established policy of, or the moral, ethical or religious beliefs of, such physician, surgeon, registered nurse, midwife, practical nurse or hospital. No cause of action shall accrue against any such physician, surgeon, registered nurse, midwife, practical nurse or hospital on account of any such refusal to treat or admit for treatment any woman for abortion purposes.

2. No person or institution shall be denied or discriminated against in the reception of any public benefit, assistance or privilege whatsoever or in any employment, public or private, on the grounds that they refuse to undergo an abortion, to advise, consent to, assist in or perform an abortion.

3. Any person who shall deny or discriminate against another for refusal to perform or participate in an abortion shall be liable to the party injured in an action at law, suit in equity or other redress.

Charter of the City of St. Louis[2]

Article XVIII, Civil Service:

Sec. 3, (n) *Removals and demotions.*—For removals, demotions and decreases in pay in the cases of employes whose service rendered is below satisfactory standards, designed to promote the efficiency of the service. Such action shall be effective only after written notice to, with right of appeal in, the employes affected, and after such investigation as is appropriate to insure that the action taken is on the sole ground of merit and fitness.

Sec. 16. Racial, political and religious discrimination. —No recommendation or question under the authority of this article shall relate to the race, political or religious opinions, affiliations or service of any person. No person shall be appointed to a position in the classified service hereunder, nor be demoted, re-employed, promoted, removed, increased or reduced in compensation, nor in any other way be favored or discriminated against in any matter within the purview of this article, because of his race, political or religious opinions, affiliations or service.

Sec. 22. Violations of civil service provisions.—Any person who shall willfully or through culpable negligence violate or conspire to violate any provision of this article or of any ordinance made pursuant theretofore which no other punishment is provided herein, shall be guilty of a misdemeanor, and, upon conviction thereof in any court

[2] Article XVIII, is reproduced in full in the Appendix.

of competent jurisdiction, shall be punished by a fine of not less than one hundred dollars and not more than five hundred dollars or by imprisonment for not to exceed six months, or both, in the discretion of the court. The conviction of any employe of any such offense shall operate automatically to terminate his service and to vacate his position. Any employe so removed from the service shall not be reinstated, reemployed or reappointed, or in any other manner re-enter the service of the City of St. Louis for a period of five years from the date of such conviction, and the comptroller and any other fiscal officers responsible for payment of any compensation to such person are hereby charged with notice thereof. Nothing in this section shall be construed to supplant or in any way affect any prosecution that may be elected to be initiated under any other provision of law relating to the nonfeasance, malfeasance or misfeasance of public officers.

Federal Rules of Civil Procedure

Rule 52, findings by the court:

(a) *Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing the interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the find-

ings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

STATEMENT OF THE CASE

Jurisdiction Below

The United States District Court's jurisdiction was predicated upon claims based upon the First. Fourth, Fifth, Ninth, and Fourteenth Amendments of the United States Constitution asserted under United States Code, Title 28, Chapter 85, Section 1343, Title 28, Chapter 151, Sections 2201 and 2202, and Title 42, Chapter 21, Section 1983.

The United States Court of Appeals' jurisdiction was grounded upon its statutory powers according to United States Code, Title 28, Chapter 81, Section 1291, and Federal Rules of Appellate Procedure, Rule 4(a).

Facts Material to Questions Presented

This case was filed on August 17, 1973, in the District Court (E.D., E.D., Mo.) by the respondent as a sole plaintiff claiming to represent a too numerous class to join of pregnant women residents of St. Louis. The only named defendants were the Mayor of St. Louis and the City's Director of Health and Hospitals.

At the time of the filing, and for a period of a year thereafter, the respondent intentionally withheld from the petitioners her identity and all factual matters from which the truth or falsity

of the Complaint's averments could be determined. Because of the respondent's principal attorney's express refusal to permit civil rule discovery without protective orders, petitioners, on September 21, 1973, moved for an order, with reasonable limitations which might appear proper, requiring submission to discovery according to the Federal Rules of Civil Procedure.

The Complaint upon filing, after recitation of the jurisdictional grounds for the suit (see above), and an explanation of the failure to identify the respondent so as to avoid "embarrassment and harassment," claimed respondent was a married woman with a family, in her first trimester of pregnancy, who could not afford the expense of another child and consequent loss of employment because of the family's "severe financial straits." That she suffered certain reproductive organ difficulties which necessitated an hysterectomy which properly should be simultaneously done with the abortion she desired. She further claimed that she had gone twice in August of 1973 to one of the two hospitals of the City of St. Louis and was there advised by the hospital staff physicians to get an abortion elsewhere and then return for the hysterectomy which they recommended be done. She claimed such physicians expressed to her their refusal to abort her because of a stated hospital policy of a blanket prohibition of abortions. The claim was made that the petitioner Mayor, being the chief executive officer exercising control over the petitioner Director of Health and Hospitals and the City hospitals, on many occasions stated that abortion would not be allowed, and because of his high position, his statements were largely responsible for the existing situation of prohibiting abortions.

The stated claim for bringing the action was her (and the class she claimed to represent) desire to utilize the personnel, facilities and hospital "for the termination of said pregnancy," and that such policies, rules, regulations, procedures, and practices interfere with and deprive her and "her respective physician

of the right of privacy within the patient-physician relationship," and also deprive her of right as a woman "to determine for herself whether to bear children and maintain her marital privacy" as guaranteed by the Fourth, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution.

The relief prayed for in the Complaint was a declaratory judgment that any City policies, etc. barring, thwarting, limiting, and infringing upon the utilization of the personnel, facilities, and services of the City's hospitals for abortions, are violative of her and the class's constitutional rights; and for a "permanent injunction" to restrain petitioners and their agents from enforcing such policy, etc., against respondent or the class, so as to avoid "irreparable harm and injury to plaintiff and said class." (This latter prayer for injunctive relief was stricken by respondent on October 11, 1974.)

By a pre-filing agreement between the respondent and the American Civil Liberties Union, the corporation procured at its expense an abortion of respondent five days after the suit was filed (e.g., Aug. 22, 1973), furnished four attorneys of record to file and prosecute suit, and agreed to assume all costs, attorneys fees and other expenses of the litigation. Such abortion was done in secret (all other matters of adversary interest occurring after suit were currently broadcast to the news media by the A.C.L.U. attorneys of record or occasionally by others of such organization). The District Court and the petitioners first learned of the abortion six (6) months later on February 25, 1974; again by remarks to the media by respondent's attorney. At the time of the respondent's abortion, one of the petitioners, the Director of Health and Hospitals, had not been summoned.

Petitioners made answer on September 21, 1973, without benefit of discovery, and besides denials of the Complaint's crucial allegations, set up such general matters of defense thought

appropriate in their condition of factual uncertainty existent at the time.

On October 5, 1973, at a time petitioners were awaiting judicial relief to accomplish discovery on the allegations of the Complaint, the respondent moved for summary judgment upon a claim that the pleadings then filed (petitioner Mayor had answered interrogatories Oct. 4, 1973) and an annexed affidavit of respondent, demonstrated that no material issues existed.

This affidavit was made the day before it was filed on October 4, 1973, and the jurat was supplied by one of the respondent's attorneys of record. The affidavit tracted the Complaint's conclusionary allegations of fact, but added (par. 8) that she had been advised by a private physician "that the ordinary and routine medical procedure *in her situation* is to perform the abortion and hysterectomy in one surgical procedure, rather than two separate and distinct procedures, * * *" (emphasis added). Finally, the affidavit ended (par. 9) with the statement:

> 9. The present and real threat by defendants to implement and enforce the policy herein challenged deters said plaintiff from receiving medical care in a manner beneficial for her health and safety and in a manner consistent with the highest standards of medical practice.

The affidavit, so far as it positively states that petitioner was then in need of an hysterectomy and simultaneous abortion was materially false, and deceptive to both the District Court and petitioners, and could hardly not be known as false by the attorneys for respondent who were also agents of the A.C.L.U. which had accomplished the abortion of petitioner over two months prior pursuant to the aforesaid agreement.

In response, petitioners, in their situation of respondent's devised ignorance, in order to protect against the threat of summary judgment, reminded the Court by motion of their existing

discovery disability and consequent incapacity to oppose the respondent's motion with any contrary factual matters, and again asked for discovery on respondent and denial of her motion for summary judgment. The Court did not, at the time, rule on the matters.

As a result of the knowledge learned as beforesaid on or about February 22, 1974, petitioners on February 25, 1974, moved the District Court for an order requiring petitioner to disclose whether her claimed pregnancy had been aborted and her reproductive organs had been removed, permanently barring further pregnancy. On the same day (Feb. 25, 1974) respondent's attorney in response to an oral instruction from the Court, filed a letter admitting the abortion of respondent on August 22, 1973, but making no mention of the hysterectomy claimed to have been required. Concomitantly the petitioners moved the Court to dismiss this action. By memorandum order filed March 22, 1974, the District Court granted petitioners' motion on the grounds of the respondent's lack of personal and representative standing and the mootness resulting from the abortion before the case could be heard.

Respondent appealed the District Court's judgment to the Court of Appeals for the Eighth Circuit on March 26, 1974.

On appeal respondent did not formally present any questions to the Court of Appeals but argued "The Inappropriateness of Dismissal for Lack of Standing" and importuned the Court to decide the case in her favor on the basis that the policy (then of undefined import and unknown application to respondent) "* * * intruded into the decision-making privacy of the woman and the medical personnel of these [City's] institutions. * * *" The Court reversed and remanded on the basis that pregnancy at time of filing but not at time of hearing was sufficient for both personal and representative standing, and non-pregnancy before hearing at the trial level did not render the claims of respondent

moot. Petitioners' timely rehearing and rehearing *en banc* petitions were denied.

After the Court of Appeals' reversal and remand, the District Court held a pre-trial conference to consider and dispose of matters delaying trial. At this time, upon the Court's expression of intent to order discovery on the respondent, her attorneys agreed to an oral deposition setting. Also at this time in response to respondent's attorneys' inquiry, the Court informed both parties' attorneys that the Complaint would be construed as not raising any issue concerning the staffing practices or procedures at the City's hospitals; but that the Complaint could be amended or a new suit filed so as to put such matters in issue. In the history of the case the Complaint was never so amended and the trial court, at the trial following, consistently ruled that evidence of the respondent attempted to be offered on such matters was beyond the scope of the issues formed by the pleadings and was inadmissible to prove such a claim. The petitioners relied on these rulings and confined their defense and proof to the issues tried by the District Court. (T. 57-58).[3]

After deposing the respondent on August 28, 1974, thereby first learning of the factual contentions of the respondent (except of the abortion learned earlier), petitioners filed for summary judgment supported by affidavits of each medical person and their Division superior of City Hospital No. 1, gynecological and obstetrical service, who had treated the respondent, and the complete medical documentary record of the hospital regarding the respondent. These contradicted the claims, affidavit and deposition of the respondent. The Court, on November 20, 1974, denied both the respondent's and petitioners' motions for summary judgment and ordered trial on November 25, 1974.

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[3] References to typewritten transcript of the trial.

Upon trial without a jury on November 25, 1974, the case was presented in less than a full day, with a long noon recess (to accommodate respondent) and an early afternoon adjournment.

Respondent, through the Mayor and Doctor Wochner (Director of Health and Hospitals and Acting Hospital Commissioner) established that the policy or rule, existing for years pursuant to Missouri State law against abortion other than to save a mother's life, was directed to be continued to Doctor Wochner by the Mayor sometime in May 1973 after his election in April of that year. As understood by the Mayor and Doctor Wochner, the question of jeopardy to the mother's life was a medical decision to be determined by the patient's attending physician. Intensive discussions were occurring between them up to the time this suit was filed regarding the legal, medical and moral questions of the policy, and that litigation was going on in the State with attendant great public uncertainty. The Mayor has deep moral feelings against non-therapeutic abortions which was communicated to Doctor Wochner, but he (Wochner) believes abortion service ought to be given at the City's hospitals. (T. 6, 7, 10, 20-26). Because of the continuing discussions and the Mayor's feelings, Doctor Wochner did not implement the installation of such service. (T. 30-31). Doctor Wochner had weekly or biweekly conferences with his hospital medical cabinet at which the status of these discussions was reported, but the only person he informed in writing regarding such policy was the president of his medical staff. No general directive was made. (T. 26-27). The working physicians and medical students, of City Hospital No. 1, gynecology and obstetrics Division No. 2, service, who came in personal contact with respondent, were not informed of such policy, nor was the chief of their said Division. And each testified that it was not a factor in their treatment of her. (T. 49, 50, 85, 91-95, 101, 104, 108, 113-119). Further, neither of the hospitals by-laws dealt with abortion. (T. 39).

The respondent's evidence demonstrated that the City's hospitals have an organic medical staff. Private physicians are not allowed to admit or treat patients in them. Each hospital patient is a patient of the City treated by City hospital physicians. The City's hospitals are also medical instructional institutions having teaching relations with the two medical schools in St. Louis, namely, St. Louis University, a Jesuit, Catholic institution, and Washington University (formerly sectarian but is now nondenominational). Medical school teaching professors are furnished as staff instructors in many of the services of the City's hospitals and in some services medical students receive some of their clinical instruction. (T.31-33.) The Ob-Gyn service at City Hospital No. 1 is staffed by physicians and attended by medical students affiliated with St. Louis University Medical School. (T. 33.) Respondent attempted to prove the physicians at City Hospital No. 1, practicing in Gyn-Ob Division No. 2, were prohibited through their affiliation with St. Louis University Medical School from performing non-therapeutic abortions at the Hospital before medical students. However, the Court overruled such attempts and admitted the personal professional, ethical, moral and religious views of such physicians as material to their theoretical interpretation and execution of the contested claimed policy. (T. 57-58.)

The proof relating to respondent's factual relations was provided by her medical record kept by the Hospital (Resp. Ex. No. 2), the testimony of the Hospital medical personnel who treated her there, and her account of the same occurrences.

The medical record and the medical personnel agreed that she had a long history of treatment at the Hospital starting in 1963 when she was 17 years old. Immediately relevant to this suit she made a visit on August 7, 1973, at age 26, to the Gyn Clinic complaining of vaginal infection about which she had visited the Clinic about a month before. She also stated she thought she was pregnant and, if so, wanted to know the fetal

age for a possible abortion with "Planned Parenthood." (T. 86; Exhibit No. 2.) Examination by a third-year medical student (under general supervision) indicated suspected pregnancy, vaginal infection, some small polyps in her cervical canal, and retroverted uterus. Her general condition of health was good. Routine laboratory tests were ordered including a pregnancy test; and she was given a future appointment to Gyn for August 13, 1973, to learn the outcome of the tests. She was also given medicine for the infection. No medical indications for abortion were observed (T. 85). She did not indicate she wanted an abortion at the City Hospital (T. 88).

On August 13 1973, respondent returned to the Gyn Clinic where she again was treated by another third-year St. Louis University medical student. She was immediately told the test specimen of August 7, indicated she was pregnant. Whereupon she became very distraught saying because of the possibility of her husband going to prison she wanted a hysterectomy and an abortion (T. 96). The student then consulted with a physician superior who directed that she be given an appointment at the Obstetrics Clinic (T. 94). Because of her upset condition he gave her an appointment to the Ob Clinic for the next day, August 14, 1975. He found no medical indications for abortion or hysterectomy (T. 91, 94-95), and that, at the time, he was unaware of any City hospital policy against abortion (T. 97). He advised respondent that, under health circumstances, he knew of no physician at the hospital who would perform an abortion for the reasons she related (T. 96-97).

On August 14, 1973, she returned to the OB Clinic of the Hospital and was there received by a staff physician who initiated a usual past history investigation when the respondent interrupted to ask if such was necessary since she was there only for the purpose of securing a statement of the length of gestation for possible cessation at another facility (T. 101). He told her that because of his personal ethical, professional, moral and

religious beliefs, where she had no medical indications for abortion (T. 102 and 104), he would not give her such a statement to be used for abortion, but would refer her to another physician (whose beliefs he did not know) who might give her the statement she desired (T. 102). He, too, was unaware at that time of any City hospital policy against abortions. (T. 107-108).

Immediately, respondent was referred to Dr. Ziad Abu Dalu, a graduate of the medical school of the University of Cairo, Egypt, who on the occasion was affiliated with St. Louis University since 1972, and a resident physician at the City Hospital (T. 110). During Doctor Dalu's initial interview of her she told him of her personal reasons for wanting to abort her child, amongst which he remembered was the possibility of her husband going to jail. She told him she had been to "Planned Parenthood" and had been asked to pay $175 for an abortion which she couldn't afford and, therefore, wanted the abortion from City Hospital (T. 112-113). He told her "we couldn't do one at City Hospital and I didn't explain to her my personal reason or otherwise." (T. 113). He testified that the reason he told her this was because in his medical judgment an abortion was not medically justified under her circumstances (T. 113, 118-119). He was aware of the University policy regarding abortions but not of a policy of the City (T. 118-119, 123). He gave her the certificate of fetal age she had requested (T. 116-117); such certificate was later tendered to the abortion clinic for the August 22, 1973, abortion, and procured from its records (T. 79 and 82; Exhibit B). Respondent appeared again at the Hospital OB Clinic the next day (August 15, 1973) and was immediately referred to Doctor Dalu on her claim of bleeding from the vagina. He found her claim to be false (T. 114).

Respondent's testimonial version of the same occurrences was markedly different in several material respects. She claimed, contrary to the medical personnel, that she initially went to the Hospital to secure an abortion there. Whereas, the medical rec-

ords made at the time and introduced by respondent clearly recite that her initial purpose was to determine pregnancy and fetal age for use at another facility (T. 36, 64-66; Exhibit 4). She also attributed the physicians refusal to abort her as being based by them on a City policy against abortions (T. 67, 70 and 72). She attributed to Doctor Dalu advice that he would perform an hysterectomy on her at the Hospital after she was aborted elsewhere (T. 73). Whereas, none of the City physicians found any medical reasons for removal of her reproductive organs (Exhibit 2).

The District Court found that each medical student and physician who examined respondent at the City Hospital found no medical reason for aborting her and that such medical decision was based upon the opinion of the medical person uninfluenced by any policy of the City regarding abortions; and that none of them knew of any such City policy. The Court declared Section 197.032, Revised Statutes of Missouri, to confer the right upon these physicians (inter alia) to be free from any lawful coercion to perform abortions in the City's hospitals against his personal beliefs, and that the respondent did not challenge the physicians' actions under such statute. The District Court recognized a qualified Federal constitutional right of respondent to an abortion, but declared she had no right to demand that the City's physicians accede to her wish or the City so accede, where no medical reasons existed. The Court found no design or purpose of the City to deny respondent any of her Federal constitutional rights.

The respondent appealed such decision to the Court of Appeals (C.A. 8th Cir.). The points raised before the Court were: 1, whether the District Court erred in ruling that the Complaint did not put in issue the City's procurement of physicians from a religious denominational medical school; 2, if the District Court erred in so construing the Complaint, whether the proof established a violation of respondent's Federal constitutional privacy rights regarding abortion because of the procurement of a medical staff possessed of professional beliefs against non-medically indicated abortion; and 3, whether, if respondent prevails, attorney fees on the basis of her acting as a "private attorney general" ought to be awarded.

Petitioners vigorously defended against these contentions pointing out that respondent utterly failed to even point out or isolate any "clearly erroneous" findings of the District Court, and was asking for a trial *de novo* at the appellate level. The failure of respondent's proof within the issues framed by orders and rulings of the District Court was also urged; and the lack of an unlimited right in the respondent to demand an abortion contrary to the decision of the physicians was argued.

The Court of Appeals, determined that the District Court erred in construing the Complaint to exclude the issue of medical staff procurement, and held that the proof established that the City's Mayor, through the combination of his policy against non-therapeutic abortions and the physician procurement practice, denied the respondent her constitutional rights regarding abortion. The Court also found that reasonable attorney fees for the appellate stages of the litigation were $3,500, and awarded such sum to the respondent for acting as a private attorney general in securing the Federal constitutional rights denied by the Mayor; further, the Court ordered the District Court to determine and award reasonable attorney fees on the same basis to respondent, against the petitioners, for the trial phase of the case. Injunctive relief was awarded against the petitioners, requiring them to secure physicians who have no objections to performing non-therapeutic abortions.

Petitions for rehearing and for rehearing *en banc* were filed by petitioners which, while being denied, resulted in first modification of the Court's judgment striking the injunctive relief and substituting the same declarations of immediate constitutional duty as declaratory relief.

Thereafter, in due time, petitioners moved the Court to strike its award of attorney fees as unauthorized because the Federal statutes sued on, did not authorize such awards. At this time the respondent moved the Court to allow such fees on the basis of the "bad-faith" of petitioner Mayor Poelker. Such fees were so allowed by a second modification of the judgment. At the time of such order of modification, a right to file a second petition for rehearing and rehearing *en banc* was granted petitioners. Such second petitions were made and denied.

Upon remand to the District Court a hearing was held to determine the amount of reasonable attorney fees to be awarded according to the mandate. The District Court, applying the guidelines of a case cited as to be followed by the Court of Appeals, found the sum of $9,317.50 as a reasonable fee for the trial stage services, but on stipulated evidence showing no agreement to pay any fees by respondent, did not adjudge such sum against the Mayor. The respondent has appealed this judgment to the Court of Appeals.

REASONS FOR GRANTING A WRIT OF CERTIORARI

I. Abortion on Demand

This case presents the clear-cut question of whether a woman has a Federal constitutional right to demand that a municipality abort her pregnancy contrary to the medical opinions of its municipal hospital staff physicians treating her. This question has not been ruled by this Court, and due to the overwhelmingly common practice of great urban public hospitals of providing their own publicly employed physicians and the consequent massive incidence of the problem, the question is of great and immediate National importance calling for settlement by this Court. Because the question occurs in a governmental setting, resolution must necessarily deal with not only the Federal constitutional privacy rights of women, but implicates a State's social structure of the Family so far as a municipality is presented with law and factual aspects of such institution to which it must routinely accommodate, and the most fundamental civil rights of publicly employed persons, grounded in the Federal and State constitutions and State statutory enactments.

The Court of Appeals opinions sanction such an abortion demand (albeit couched in less stark terminology) but utterly fail to deal with the inescapable implications of its decision, and more, grossly castigates and severely punishes a public official for recognizing and raising such matters for the Court's resolution. Fidelity to public office impels our giving this Court opportunity to redress matters and give controlling future direction.

To appreciate the reach and practical effect of the Court of Appeals opinions it is vital to recognize that most very large, urban, municipally-owned general hospitals are organized as complete, self-sufficient medical treatment facilities. Private

practitioner physicians have no patient admission arrangement with the hospital and are not allowed to practice in the hospital. Such public hospital has its own, full-time organic staff of physicians who are in the employ of the city and commonly processed through civil service procedures just as are other categories of municipal employees. This is the situation here. (T. 31-33; see Charter of St. Louis, Art. XVIII.)

Entrance to such a hospital by the patient is not through a physician. The patient makes the first contact with the hospital itself. Normally such entrance is made through the hospital's various clinics or the emergency room service. The patient is assigned according to his health needs to a category of medical and hospital administration service where he then encounters the physicians associated with that service. Charges for these physicians' services are made by and owing to the hospital (i.e., the city) and not to any physician that might have performed them. His compensation is a legislatively determined salary. (T. 31-32)

The physician chiefs of these various services not only perform an administrative function at the hospital, but customarily perform a teaching or instructional role respecting the lesser experienced physicians and medical students from a medical school having an arrangement with the city. This dual function gives rise to a dual position; other than the treatment hospital role, the chief will normally also have a professorial position with the medical school (or schools) so associated. (T. 41.)

This Court, in the context of State criminal law statutes, made plain that a woman's right regarding an abortion of her pregnancy is a limited one—not absolute. (*Roe v. Wade*, 410 U.S. 113, l.c. 154 (S.Ct. 1973), and *Doe v. Bolton*, 410 U.S. 179, l.c. 189 (S.Ct. 1973).) Such right essentially is to be able to secure the services of duly accredited physicians who, free from state interference or criminal sanctions, consult with her to be

advised of her particular health circumstances as they affect the medical decision of whether to perform an abortion on her.[4] The ultimate decision is not the woman's but the physician she has consulted with. (*Roe v. Wade*, supra, l.c. 163 and 164.)

The range of considerations may be practically unlimited, but those that may be relied upon by the physician in making his "abortion decision" have not been mandated by this Court. (*Roe v. Wade*, supra, l.c. 163; *Doe v. Bolton*, supra, l.c. 192; *United States v. Vuitch*, 402 U.S. 62, l.c. 71-72.) The physician, if in fact he is to make the decision and not the woman, must be free to exercise his "best clinical judgment." While the Court has recognized an expended scope to the physician's health considerations theretofore limited by State criminal statutes, it has likewise refrained from imposing a constitutional scheme of medical values and left such matters to the realm of the science and art of medicine.

The Court of Appeals has ignored this all important role the physician plays in the constitutional plan for the operation of the woman's limited rights in the abortion privacy rights area. The Court of Appeals presupposes that the range of valid medical considerations that may properly enter into the "abortion decision" of the physician are equivalent to or define a woman's right to be aborted. This is to say: she has a right to be aborted by an attending physician because the range is so all-encompassing there is no real possibility that she can't assert one or more as subjectively important to preserve her health. This entirely motivates the judgmental function of the physician and shifts the causitive factor to the "wish" or "desire" of the woman as repeatedly mentioned by the Court of Appeals.

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[4] It appears to be arguable whether the length of gestation is a considerable factor at all where preservation of maternal health is presumably a constant valid medical consideration at all periods, and is so broadly inclusive as to have no practical limitations whatever.

That this is so is abundantly demonstrated by the Court of Appeals centering its attack upon the ethical and presumed religious views of the physicians treating the respondent. (*Doe v. Poelker*, 515 F.2d 541, l.c. 543-544 (C.A. 8th Cir. 1975.) In inspecting this aspect of its reasoning it is crucial to keep in mind that the City hospital physician staff of the Gyn-Ob Departments were admittedly *not* assembled in any way or time relationship to the Supreme Court's decisions regarding abortion, but were the product of long existing cooperation between the City and St. Louis University Medical School.[5] On appeal respondent expressly admitted this which was never really in dispute. (See: *Appellants'* [respondent's] *Statement, Brief and Argument*, p. 18.) Neither this Mayor nor his predecessors played a direct or indirect role in physician procurement. (T. 31-32.) The Court of Appeals opinions make clear that a woman going to the City's hospital after having determined to be aborted, must be supplied with a physician to carry out *her* decision. Such a legal conclusion is explicit in the Court's remark (*Doe v. Poelker*, supra, 515 F.2d l.c. 544):

> * * * Likewise, it is clear that the staffing procedure effectively foreclosed any possibility that a pregnant woman could ever find a staff physician who would agree to perform an abortion in the city hospital unless her life or health was in severe danger. * * * (Emphasis supplied.)

Again, the express declaration of the Court of Appeals that the "method of staffing" is unconstitutional and directing that the City "* * * obtain the services of responsible physicians and other necessary personnel whose views on abortion do not prohibit them from providing an abortion * * *," positively interjects the City into the "abortion decision" by requiring an ethical, moral and religious test of physicians so as to meet the

[5] The other local medical school, Washington University was similarly involved, but through the years reduced its participation so as to adequately staff its private University associated hospitals.

demand of the woman to be aborted (*Doe v. Poelker*, supra, 515 F.2d l.c. 546). Contrary to the teachings of *Roe v. Wade* and *Doe v. Bolton*, supra, the woman is vested with a right to "shop" the medical staff so as to find a compliant physician who will abort her for any "health" reason she asserts. And the City is required to insure that they are available to be found. The Court has disqualified the present physicians from practicing regarding the health of City hospital pregnant patients strictly because their medical views are influenced by their ethical professional views, or their moral opinions, or their religious beliefs. This is a new, novel and startling intrusion into the practice of medicine and, if practiced by the State outside the context of judicial coercion, would be most certainly within the prohibitions denounced by this Court in *Roe v. Wade*, supra, 410 U.S. l.c. 163, and *Doe v. Bolton*, supra, 410 U.S. l.c. 216. The Court of Appeals has effectively intruded where all others are barred. There hardly, at this time, need be a labored exposition of the fundamental United States First and Fifth Amendments' constitutional violation implications for such physicians and the City is dealing with them. The Court of Appeals has rejected the truth that it is just as valid a medical position to believe that non-therapeutic abortion is medically unsound.

The institutionalization of "abortion on demand" is certainly contrary to the reasonable import of this Court in *Roe v. Wade* and *Doe v. Bolton*, and expressly so declared by the Chief Justice in his concurring opinion. (*Roe v. Wade*, supra, l. c. 207.)

II. Appellate Abuse of Discretion

1. Overturning District Court's Findings.

Petitioners seek Supreme Court review (under its Rule 19 (b) superintending powers) of this case on the basis that the Court of Appeals, in its adjudicatory powers departed so far from

common standards of fairness and impartiality of judicial practice that, in order to preserve important public rights in this litigation and to preserve future judicial regularity through precedent, intervention by this Court is required.

Nothing need be said to add to the Court's history of insistence upon fairness and impartiality in the judicial process according to the requirements delineated for due process of law as declared through the Fifth Amendment (and Fourteenth) of the Constitution of the United States, and formally recognized by Rule 52(a), Federal Rules of Civil Procedure. We urge that the appellate record of this case most forcibly brings these principles to the fore for application once again.

An examination in some detail of the Court of Appeals' first opinion (April 14, 1975) gives a clear exposition of the manner that Court totally vitiated an adversary trial, rendering nugatory the District Court's findings and assessment of the believability and accuracy of the witnesses and documents; and thereafter, finally reversing, granting injunctive relief it later had to withdraw; and severely convicting and punishing the petitioner Mayor on the untried issue of "bad-faith" after being obliged to abandon an earlier attorney fees award on a "private attorney general" basis.

An impossible impediment the Court of Appeals logically first had to overcome before it could disagree with the findings of the District Court and then finally reverse, involved the inclusion of issues raised by the Complaint. The District Court's findings and judgment, reviewed according to the construction placed on the Complaint by the District Court and so tried by it, were unassailable. The evidence amply supports the findings and the trial court had seen and heard the sources at the hearings as to better determine truth upon conflicts. To overcome this, the Complaint had to be reconstructed to permit appellate trial *de novo*.

The District Court, shortly before trial, upon respondent's attorneys' inquiry,[6] ruled that as the Complaint stood, attempted proof by respondent into the professional ethics, morality, or religious beliefs of the physicians at the Gyn-Ob Department of City Hospital No. 1, or physicians respondent was treated by, would only be material to the Complaint for the limited question of whether the so-called "Mayor's" City abortion policy in fact biased or interfered with the personal medical opinions of the City physicians and medical personnel who had treated the respondent. Evidence going to proof of staffing with physicians of a certain medical, ethical, moral or religious belief was ruled beyond the scope of the Complaint.[7]

The uncontroverted record showed that the attacked policy continued by the Mayor and which petitioner Wochner did nothing substantial to enforce, was *not* the cause for the City physicians refusing to accede to the respondent's request to be aborted. As a consequence, "clearly erroneous" findings, under the trial court's construction of the Complaint were nonexistent.

At appeal, the respondent had failed to point out any erroneous findings (clear or otherwise) of the District Court, and attacked the aforesaid construction of the Complaint, arguing the physicians' medical school affiliation as an interference with her constitutional rights.

The Court of Appeals, without averting to the lawful scope of review commanded by Rule 52(a), Federal Rules of Civil Procedure, first isolated the crucial findings of the District Court regarding the refusal of the physicians to abort respondent, then

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[6] And after they had shortly before first seen the City physicians' and medical students' affidavits (supporting summary judgment motion of petitioners) disclaiming any knowledge of the City's abortion policy and attributing their refusal to abort respondent to an absence of medical indications.

[7] The Court offered to permit the respondent to amend the Complaint so as to include such issue, but this was never done.

substituted its *ipse dixit* findings to the effect that the "Mayor's policy" in *combination* with the staffing of physicians from a Catholic medical school, was unconstitutional in violation of respondent's rights. For the most part such substituted findings are merely supported by the Court of Appeals gratuitous assertions that such conclusions are "strongly indicated," "strongly suggest[ed]," "indicated," or "stripped of all rhetoric."

The underlying legal basis for this appellate *trial de novo* is relegated to a footnote declaration (slip opinion, April 14, 1975, p. 5, footnote 4; Appendix) that the words in the Complaint "procedures and practices," are broad enough to raise an issue of whether the City's past history of physician procurement was a means to denying non-therapeutic abortions. The *non sequitur* that the Federal Rules of Civil Procedure (Rule 8(f)) provide that pleadings shall be construed to do substantial justice is cited without attempt at justifying its application against petitioners. The fairness (e.g., "substantial justice") owing to the petitioners is passed over with a bootstrap observation that they "could hardly complain" of surprise "in view of the broad wording of the [C]omplaint, [a]nd when Doe [respondent] put on evidence relating to staffing, the City [i.e., petitioners] did not ask for a continuance or attempt to offer any contrary evidence of its own."

The gross unfairness of this treatment is substantiated by the fact that it would be impossible to "complain" about the Court of Appeals' reconstruction of the Complaint in the trial court before it occurred; and the "evidence" thus created by the Court of Appeals, was at the trial stage admitted for another purpose and *excluded* for the purpose seized upon by the appellate court. The potential logic of the petitioners in the trial court *asking for a continuance or offering contrary evidence* (when the District Court had not only at pre-trial conference excluded such issue as a matter for trial, but also faithfully adhered to such ruling throughout the trial (T. 58 and 60)) is nonexistent, and presents no unusual phenomenon because it was not done.

This reconstruction of the Complaint by the Court of Appeals is mystifying when it is considered that the same court, with the full original record before it; entertaining extended oral argument; failed itself to see such additional meaning of the two words "procedure and practice" in the Complaint on the prior appeal, and itself then construed the meaning and reach of the Complaint just as the District Court did. (See: *Jane Doe, et al. v. John H. Poelker, etc., et al.*, 497 F.2d 1063 (C.A. 8th, 1974).) All of the interrogatories, memoranda, and the brief of the respondent in the first appeal, also construed such language as singularly referring to the Mayor's statement against non-therapeutic abortions as the "policy" attacked. It was only after respondent foresaw her nonsuit on such issue shortly before trial that the "staffing" issue was attempted to be raised.

The *hiatus* of any proof of a "combination" of the Mayor's policy with the "staffing procedures" relied on by the Court of Appeals as a denial of a constitutional right is patent and stark. (See: *Doe v. Poelker*, slip opinion, April 14, 1975, p. 6; Appendix.) Here a failure of the respondent's mere promise of later proof is utilized to adopt a far reaching conclusion (T. 61);[8] similarly, the grossly conjectured finding that the policy and staffing procedure were effective to thwart respondent (and other women) from securing abortions, is not sustainable on the ground that abortions were not performed. The Mayor's "policy" is but a continuation of a command respective of Missouri law, and the "staffing" procedure antedated any question of abortion.

All of this is given devastating impact when it is recalled from the record that the respondent, as a litigational strategy,

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[8] Contrary to the respondent's promise, no such evidence was later produced.

attempted to withhold the facts of this case from petitioners and took the positive step of filing a false affidavit deceiving the District Court and the petitioners; and continued such strategy until forced to make disclosures. Opposed to this conduct of the respondent we invite a comparison with petitioners' acts throughout.

Rule 52(a), Federal Rules of Civil Procedure, set the parameters within which the Court of Appeals should have proceeded. This rule commands that the District Court's findings ought not to have been set aside unless clearly erroneous, and that due regard was to be given to the trial judge's opportunity to judge the credibility of the witnesses. The Court of Appeals had no warrant to try the case *de novo. United States v. United States Gypsum Co.*, 333 U.S. 364, l.c. 395. The efficacy of the District Court's inferences from undisputed basic facts (e.g., denial of abortion was a matter of independent judgment of the physicians) was to be respected by the Court of Appeals. *Commissioner of Internal Revenue v. Duberstein*, 363 U.S. 278, l.c. 291. The Court of Appeals was required to indulge the District Court the presumption that its findings were correct and it was the duty of the respondent to clearly demonstrate error in such findings. A reconstruction of the Complaint, after trial, does not satisfy this duty. Possibly no fairer statement of the position of an appellate court on review can be made than that of the Court of Appeals itself in *Pendergrass v. New York Life Insurance Co.*, 181 F.2d 136, l.c. 138 (C.A. 8th, 1950):

> The entire responsibility for deciding doubtful fact questions in a nonjury case should be, and we think it is, that of the district court. The existence of any doubt as to whether the trial court or this Court is the ultimate trier of fact issues in nonjury cases is, we think, detrimental to the orderly administration of justice, impairs the confidence of litigants and the public in the decisions

> of the district courts, and multiplies the number of appeals in such cases. * * *

The Court of Appeals has, until late, consistently adhered to its foregoing view of the meaning of the Rule 52(a) and expressly declared that it has no discretion to try a case *de novo; Parke-Davis and Co. v. Stromsodt*, 411 F.2d 1390 (C.A. 8th, 1969); *Birdwell v. Hazelwood School District*, 491 F.2d 490 (C.A. 8th, 1974)

This appellate course completely voided an adversary trial conducted below and put the Court of Appeals in the position of, once having materially changed the issues of a trial completed on another basis, trying the case anew without according petitioners any opportunity to meet such markedly changed situation.

2. Court of Appeals initiation of petitioner Mayor's conviction of "bad-faith" and imposition of punishment by levying "attorney fees."

Any question of petitioner Mayor's "bad-faith" and punishment therefor first arose and was decided against petitioner in the Court of Appeals. The issue was never raised in the District Court, no trial of such matters was there had and the District Court awarded judgment for the petitioners, against the respondent with prejudice. The Court of Appeals in its original opinion of April 14, 1975, on respondent's suggestion in her brief, granted an allowance to her against Mayor Poelker of $3,500 for the "appellate portion" of the litigation, and also made an award in her favor against the Mayor for trial attorney fees, in an amount to be determined on remand of the outright reversal of the District Court. The settled basis for these awards was the appellate court's conclusion, that under its "equitable powers" such fees could be

awarded because the respondent had acted as a "private attorney general." The Court specifically rejected respondent's suggestion of the alternative ground of bad faith. (See: slip opinion, April 14, 1975, p. 13, footnote 8; Appendix.)

Since there existed no statutory authorization for these Court of Appeals awards, and the matter was one not litigated below, petitioners moved the Court to strike such findings and the awards based on them, suggesting the applicability of the recent case of this Court, *Alyeska Pipeline Service Co. v. Wilderness Society*, — U.S. —, 95 S.Ct. 1612, 44 L.Ed.2d 141 (S.Ct. 1975), as controlling.[9] The respondent concomitantly moved the Court to deny the motion and sustain the awards on the suggested bases of "willful violation of court orders" and the "bad-faith" of petitioner Mayor Poelker.

In response to petitioners' motion, the Court of Appeals again modified its opinion striking the awards of attorney fees on the basis of private attorney general but adopted the respondent's suggestion to make the same awards on the basis of "bad-faith." (See: Order, June 2, 1975; Appendix.)[10]

We urge that these judicial acts are without authority and constitute a flagrant abuse of discretion.

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[9] This was the second occasion petitioners were required to move the Court of Appeals to correct erroneous awards against them. Prior, on oral argument (second appeal) before Div. No. 2, upon one of the judges initiation of discussion of the nature of mandatory injunctive relief to be awarded against petitioners, petitioners there pointed to the record showing that the respondent had stricken her prayer for such relief and called upon her attorney to concede the same which he did. None-the-less, in its judgment (slip opinion April 14, 1975; Appendix) the Court made such an award of injunctive relief. On petition for rehearing, the Court, *en banc*, on May 7, 1975, modified the divisional opinion so as to eliminate the terms "injunctive relief" at each occurrence and substitute therefor the words "declaratory relief." (See: Order, May 7, 1975; Appendix.)

[10] Presumably because of a total lack of any foundation in the record for conjecturing "willful violation of court orders" (suggested by respondent), the Court makes no mention of such basis.

The stated ground for the conviction of petitioner Poelker of "bad-faith" and making the several awards as punishment, is the Court's supposition that the law was so clear after the United States Supreme Court decided *Roe v. Wade* (supra) and *Doe v. Bolton* (supra) in 1973, and the Court of Appeals had decided *Word v. Poelker*, 495 F.2d 1349 (C.A. 8th Cir., 1974) and *Wulff v. Singleton*, 508 F.2d 1211 (C.A. 8th Cir., 1974), that any defense against the respondent's claims (as reconstructed by the Court of Appeals) was frivolous and insubstantial, demonstrating "a wanton, callous disregard for the constitutional rights of indigent pregnant women continuing long after those rights had been clearly enunciated by the Supreme Court in *Roe v. Wade*, supra, and *Doe v. Bolton*, supra."

This is an untenable position. Neither *Roe v. Wade* nor *Doe v. Bolton* decided that municipal hospitals must furnish women "wishing" or "desiring" non-therapeutic abortions with physicians and facilities to carry out their wish. These Supreme Court decisions dealt strictly with the resolution of a woman's personal right as measured against the State's rights under the criminal law. (The correlative rights of physicians were, of course, dealt within the same context.) These *Roe* and *Doe* opinions simply do not address the issue of municipal provision of physicians to perform abortions for either indigent women or women with means. It would have been more understandable if the Court of Appeals had reasoned from these cases by analogy to decide this case recognizing that the Supreme Court has not decided the question presented here; however, even such a course could not jurisprudentially excuse the Court of Appeals' abuse here because the issue was *not* the meaning of *Roe* and *Doe* but the petitioner's "bad-faith" in not interpreting these cases as the Court of Appeals ultimately did! At the very least it can be said that reasonable men can differ on the application of *Roe v. Wade* and *Doe v. Bolton* to the present case. And if this be so it is manifestly unjust to convict a litigant for seeing the situation differently than the Court of Appeals.

The Court of Appeals cites as additional evidence of petitioner's bad-faith its decision in *Wulff v. Singleton*, 508 F.2d 1211 (C.A. 8th Cir., 1974), as instructive of the law applicable to this situation and to be presumed known to the Mayor. The observation is as follows (slip opinion, April 14, 1975, pp. 8-9; Appendix), viz.:

> In the recent decision in Wulff v. Singleton, supra, 508 F.2d at 1215, the state of Missouri had by statute prohibited medicade payments to women receiving welfare benefits who had undergone nontherapeutic abortions while, at the same time, providing such payments to women welfare recipients who carried their pregnancies to term. This Court stated: "This classification is a clear violation of the Equal Protection Clause of the Fourteenth Amendment." *There is no practical distinction between that case and this one.* (Emphasis added.)

As can be seen, the *Wulff v. Singleton* case involved construction of Title XIX of the Social Security Act; that is, Federally provided funds administered by the State. Not the question of *whether* the Federal or State government were constitutionally required to provide such funds for "indigent women." As a consequence, the analogy is rather distant from the case of whether a municipality must recruit compliant physicians for pregnant women "desiring" abortions. Further, the force of the Court of Appeals' reasoning is all but destroyed by the express disagreement other United States Courts of Appeals have had with *Wulff v. Singleton*. In *Roe v. Ferguson*, — F.2d —, the Court of Appeals for the Sixth Circuit (Slip opinion, filed April 28, 1975, in No. 74-2195), at pages 9-10 of its opinion stated in part:

> We find ourselves, therefore, in disagreement with the Eighth Circuit's ruling in *Wulff v. Singleton*, 508 F.2d 1211 (8th Cir. 1974), that the unconstitutionality of this type of statute is so "obvious and patent" as to obviate the need for a three-judge court.

The Second Circuit has also lately disagreed with the holding of *Wulff v. Singleton*. In *Roe v. Norton*, — F.2d —, (slip opinion, decided July 31, 1975, in No. 74-1874), the Court observed that *Roe v. Wade*, supra, and *Doe v. Bolton*, supra, did not deal with the question of a State's right to restrict payments for abortions under social welfare programs such as Medicaid, and "despite lower court decisions holding such restrictions unconstitutional, it cannot be said that this issue has been put to rest by the Supreme Court." The Court (C.A. 2d Cir.) stated it agreed with the Sixth Circuit and disagreed with the Eighth Circuit on this question. Emphasis is added to the lack of "foreseeability" of the law applicable to Mayor Poelker by the Supreme Court's granting *certiorari* in *Wulff v. Singleton*, supra (cert. granted 43 L.W. 3674, June 23, 1975).

Moreover, the District Court's twice granting judgment for petitioners is destructive of the Court of Appeals' postulate that the law was so "clear" or "clearly enunciated" or "clear dictates of the Supreme Court" that petitioner Poelker was in "bad-faith" in not adhering to it or in defending against the respondent's claims.

The reliance of the Court of Appeals on the several cases litigated in Missouri as a demonstration of the Mayor's adjudicated "bad-faith" also fails upon objective inspection. *Word v. Poelker*, 495 F.2d 1349 (C.A. 8th Cir. 1974) and this case are cited to sustain such found history of "obstinancy." Of course, the Court's characterization of the Mayor's conduct is the very matter disputed here; but the case of *Word v. Poelker* (supra), merely involved the City's defense of an ordinance regulating (e.g., not prohibiting) abortion clinics. This could not, with accuracy, be considered as evidence of a:

> wanton, callous disregard for the constitutional rights of indigent pregnant women continuing long after those rights had been clearly enunciated by the Supreme Court in Roe v. Wade, supra, and Doe v. Dalton, supra • • •

as found by the Court (see: slip opinion modification Order, June 2, 1975, p. 13).

Mr. Chief Justice Burger in *United States v. 12 200-Ft. Reels*, 413 U.S. 123, l.c. 127, gave pointed warning against too easy extension of a rule to new dissimilar situations:

> * * * The seductive plausability of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth "logical" extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance. This kind of gestative propensity calls for the "line drawing" familiar in the judicial, as in the legislative process: "thus far but not beyond."

The law declared by the Supreme Court does not seem, in rational application, to warrant the conviction of Mayor Poelker of bad faith and authorize such a severe condemnation and punishment.

It is clear and beyond cavil, that actual "bad-faith" practiced by a litigant in the course of litigation can be, and properly ought to be, punished. (*Alyeska Pipeline Service Co. v. Wilderness Society* (supra); and citations therein.) However, this laudable rule, under the perceived applications authorized by this Court, is not a device permitting arbitrary conviction and punishment without notice or hearing and capricious imposition for having a differing opinion in a new and very passion evoking field, or defending according to well recognized juridical norms.

The Supreme Court gave cogent evidence of the true meaning of the rule in *Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575 (S.Ct. 1964). There the Court equated "bad-faith" with contempt. The same gravamen of the offense

is illustrated in the earlier case: *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399 (S.Ct. 1923). Particularly, in the *Universal Oil Products Co. v. Root Refining Co.* case the Court demonstrates its meticulous insistence that due process of law be accorded a person prospectively considered for punishment for "bad-faith."

Here we respectfully urge there are no facts relating to the conduct of the Mayor which could fairly be assayed as equivalent to a contemptuous disregard of the law; or an ignoring of anyone's rights under "ancient law" such as in *Vaughan v. Atkinson*, 369 U.S. 527 (S.Ct. 1962). Rather, there exists a *good faith* difference of opinion as to the law of this case, and an honest defense to contrary claims so that the matter can be resolved according to due process. In convicting petitioner Mayor Poelker of bad-faith and levying a fine upon him as "attorney fees" in the course of an appellate proceeding, the Court of Appeals has deprived him of that most fundamental right under the Fifth Amendment to the United States Constitution—due process of law.

III. **Justiciability, Standing and Mootness**

Petitioners respectfully urge that the justiciable case or controversy requirements of Article III, of the United States Constitution, fully sustain the District Court's final determination of mootness under the facts of this case.

The salient facts material to this question are simple and uncontested. The respondent filed her suit on August 17, 1973, against the two petitioners, for a mandatory injunction requiring petitioners as the primary executive officers having control over the City's hospitals, to cause to be simultaneously performed on her an hysterectomy operation and an abortion of her preg-

nancy, and for a declaration of law of like settlement for all similarly situated members of a class.[11]

The respondent, five (5) days after the filing of suit caused herself to be aborted (according to admission of counsel). No disclosure of such fact was made until six (6) months thereafter. The record is silent as to the occurrence of an hysterectomy as claimed to be simultaneously required by the Complaint.

At the time of the abortion of respondent on August 22, 1973, R. Dean Wochner, M.D., the second named petitioner, had not been served with a summons or the Complaint, and, of course, no responsive pleadings were required of either petitioner and no issues were as yet framed for trial.

The physiological fact of the abortion absolutely rendered the Complaint's prayer for respondent's personal abortion injunctive relief nugatory to try, and impossible for the Court to enforce, or the petitioners to obey. The only reason this anomalous status of the case did not timely appear was because of the respondent's imposed secrecy, her refusal to submit to discovery and a deceptive and false affidavit she filed.

Upon challenge, these facts argue irresistibly against the respondent's Federal standing to sue. At the threshold, the words of Mr. Justice Reed, spoken for the United States Supreme Court in *United Public Workers v. Mitchell*, 330 U.S. 75, l.c. 89, are appropriate:

> As is well known the federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues "concrete legal issues, presented in actual cases, not abstractions," are requisite. This is true of declaratory judgments as any other field.

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[11] The likelihood of many women existing locally to satisfy such a class appears to be negligible, if not nonexistent.

And in *United States v. Raines*, 362 U.S. 17, l.c. 21, the reiteration was couched:

> This Court, as in the case with all federal courts, "has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." Liverpool, N.Y. & P. S. S. Co. v. Commissioners of Emigration, 113 US 33, 39, 28 L ed 899, 901, 5 S Ct 352.

Standing to sue is a rational concept grounded in the imperatives of Article III of the Constitution and not a formal rule for administration of the Federal courts. As a substantive matter, going to jurisdiction, it must exist at each stage and throughout litigation of a case, although its aspects may vary or change during the progression of the case. As was said in *Flast v. Cohen*, 392 U.S. 83, l.c. 98, "Standing is an aspect of justiciability. . . ." Determinations of Federal standing focus upon the status and character of the litigant and not the claims sought to be adjudicated. Or as put by Mr. Chief Justice Warren for the Court in *Flast v. Cohen* (392 U.S. 99):

> The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated. The "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon

which the court so largely depends for illumination of difficult constitutional questions." Baker v. Carr, 369 US 186, 204, 7 L Ed 2d 663, 82 S Ct 691 (1962). In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable. Thus, a party may have standing in a particular case, but the federal court may nevertheless decline to pass on the merits of the case because, for example, it presents a political question. A proper party is demanded so that federal courts will not be asked to decide "ill-defined controversies over constitutional issues," United Public Workers v. Mitchell, 330 US 75, 90, 91 L Ed 754, 768, 67 S Ct 556 (1947), or a case which is of a "hypothetical or abstract character," Aetna Life Insurance Co. v. Haworth, 300 US 227, 240, 81 L Ed 617, 621, 57 S Ct 461, 108 ALR 1000 (1937).

A generalized grievance or hypothetical vindication interest of a party is not enough to raise a constitutional duty for a Federal adjudication.

Further, it is abundantly clear that where the standing aspect of justiciability of a plaintiff ceases, the duty of a Federal court is clear. The case must be dismissed. Such a situation was squarely before the United States Supreme Court in *Golden v. Zwickler*, 394 US 103, where the plaintiff's relation to claims sought to be enforced (even though without any voluntary act of his own—contrary to the case here) changed to destroy standing. There the sequence of events unmistakably demonstrate that standing must exist throughout and not merely at the time of the filing of the Complaint. In the words of the Court (394 U.S. 108):

> The District Court erred in holding that Zwickler was entitled to declaratory relief if the elements essential to

that relief existed "[w]hen this action was initiated." The proper inquiry was whether a "controversy" requisite to relief under the Declaratory Judgment Act existed *at the time of the hearing* on the remand. We now undertake that inquiry.

> "[T]he federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues, 'concrete legal issues, presented in actual cases, not abstractions,' are requisite. This is as true of declaratory judgments as any other field." United Public Workers of America v. Mitchell, 300 US 75, 89, 91 L Ed 754, 766, 67 S Ct 556 (1947). "The difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 US 270, 273, 85 L Ed 826, 828, 61 S Ct 510 (1941). (Emphasis added.)

At the conclusion of its opinion the Court again stresses this continuing requirement of standing in stated (394 U.S. 110):

> We conclude that Zwickler did not establish the existence *at the time of the hearing* on the remand of the elements governing the issuance of a declaratory judgment, and therefore that the District Court should have dismissed his complaint. We accordingly intimate no view upon the correctness of the District Court's holding as to the constitutionality of the New York statute. The judgment of the District Court is reversed, and the case is remanded

with direction to enter a new judgment dismissing the complaint. (Emphasis added.)

For the sake of concentration on the precise issue, since the respondent was pregnant at the time of the filing of her Complaint, it would appear that, at least as to this factor, she was possessed of standing at that time to seek an adjudication of her claims of infringements of personal constitutional rights as a *pregnant* woman seeking certain relief. Her personally sought redress was for a judicially coerced surgical operation upon her body for the removal of claimed diseased organs and destruction of the fetus in her uterus. Declaratory relief was incidental to and dependent upon such injunctive vindication.

However, the respondent caused her own abortion on August 22, 1973, at such early pre-trial time, she thereby completely obviated that "personal stake in the outcome of the controversy" and the quality of "sufficient immediacy and reality" to warrant any justifiable relief from the District Court. Of course, objectively the Court could not enforce her abortion: this she accomplished on her own. No judgment imposing such a duty on the petitioners to cause her abortion could have any real personal meaning for the respondent—her claimed legal relationship toward the petitioners had been irretrievably changed by her own doing. As far as her litigant status was concerned, the legal effect of her act in procuring an abortion was to destroy all possibility of ever establishing on hearing the fact of pregnancy upon which her claims depended. The effect could hardly be different in substance than a failure of proof on trial.

Just as in *Golden v. Zwickler* (394 U.S. 103, l.c. 109) where the Court pointed out that the situation giving rise to the complaint was most unlikely to ever reoccur (e.g., a judge resigning and again standing for election as a Congressman), here the respondent's pregnancy was past, and according to the recitals of her Complaint (p. 3, para. 11), the concomitant hysterectomy

she had determined upon, forever destroyed any future possibility of reoccurrence.

It will be noted that the Supreme Court in *Roe v. Wade*, supra, cited *Golden v. Zwickler*, 394 U.S. 103, as particular authority in support of its determination that Roe's case was possessed of the attributes of a Constitutional "case or controversy" and she was possessed of standing as late as May 21 (e.g., the day before trial), (410 U.S. 124). The patent holding in *Golden v. Zwickler* is the necessity of the existence of such a controversy at the time of the *hearing*—not at the time of filing. There can be no question whatever that Golden presented a case or controversy at the time of the filing, yet the decision of the Court was premised upon his standing *at the time of the hearing*—not the time of filing. (*Golden v. Zwickler*, supra, 394 U.S. 108 and 394 U.S. 110.) The litigant was held to have lost his admitted filing standing (i.e., "status") at the time of the hearing, and the case, in consequence, having lost its Constitutional case or controversy posture thereby.

It would appear just as compelling that when respondent lost her personal standing the class aspect of the suit was likewise vacated. Initially, respondent was the *sole* representative of a very nebulous class. Her person with its attendant personal characteristics gave justiciability to the suit. Once her status was changed, namely: no longer being pregnant and wanting an abortion and needing an hysterectomy, the case was without that "concrete adverseness" required for adjudicating the claims according to constitutional requirements of justiciability. *Baker v. Carr*, 369 U.S. 186, l.c. 204. As the Court instructed in *Baker v. Carr* (369 U.S. 208) justiciability demands more than "* * * merely a claim of 'the right, possessed by every citizen to require that the Government be administered according to law * * *'." The corollary is, of course, "* * * federal courts are without power to decide questions that cannot affect the rights of the litigants before them." *North Carolina v. Rice*, 404

U.S. 244, 246. Of late the United States Supreme Court has had occasion to point out that the alleged rights of a class cannot survive a circumstance which renders the only party litigant's claim moot. *Indiana Employment Division v. Burney*, 409 U.S. 540. (See also: *Linda R. S. v. Richard D.*, 410 U.S. 614, and *Bailey v. Patterson*, 369 U.S. 31.)

The question of Federal standing has been the subject of United States Supreme Court consideration in the late abortion case of *Roe v. Wade*, 410 U.S. 113. There the Court considered the status of justiciability and standing of each party appellant according to their several, separate situations. Further, it is crucial to note that the Court makes a fundamental legal distinction in its analysis between *trial* standing and *appellate review* standing.

At the Court's division "A" of its opinion (410 U.S. 124) the Court first addressed appellant "Jane Roe's" standing. The Court reviewed the significant sequence of the progress of the litigation with respect to her and concluded as a matter of fact that she was pregnant at the time of the hearing before the trial court. The unquestionable fact of this observation is established by the following quotations of the Court's opinion (410 U.S. 124):

> A. Jane Roe. Despite the use of the pseudonym, no suggestion is made that Roe is a fictitious person. For purposes of her case, we accept as true, and as established, her existence; her pregnant state, as of the inception of her suit in March 1970 and *as late as May 21 of that year* when she filed an alias affidavit with the District Court; and her inability to obtain a legal abortion in Texas.
>
> Viewing Roe's case as of the time of its filing, *and thereafter until as late as May*, there can be little dispute that it then presented a case or controversy and that, wholly apart from the class aspects, *she, as a pregnant* single *woman*

> thwarted by the Texas criminal abortion laws, had standing to challenge those statutes. Abele v. Markle, 452 F2d 1121, 1125 (CA2 1971); Crossen v. Breckenridge, 446 F2d 833, 838-839 (CA6 1971); Poe v. Menghini, 339 F Supp 986, 990-991 (Kan 1972). See Truax v. Raich, 239 US 33, 60 L Ed 131, 36 S Ct 7 (1915). *Indeed, we do not read the appellee's brief as really asserting anything to the contrary.* The "logical nexus between the status asserted and the claim sought to be adjudicated." Flast v. Cohen, 392 US at 102, 20 L Ed 2d 947, and the necessary degree of contentiousness, Golden v. Zwickler, 394 US 103, 22 L Ed 2d 113, 89 S Ct 956 (1969), are both present. (Emphasis added.)

It can fairly be pointed out that in its canvass of the facts, the Court *found* that on May 21, 1970, which was the day before the trial hearing of May 22, 1970, Roe filed an affidavit of her *pregnancy*. The Court, absent any question about the matter, properly concluded it incredible that she was aborted over night especially where the trial record is silent regarding such a matter and the Court observes "Indeed, we do not read the appellee's brief as really asserting anything to the contrary * * *." (410 U.S. 124.)

After so fixing the factual context of Roe's situation at (and after) the trial hearing, the Court then turned to a consideration of her *appellate* standing. The immediate cause of this inquiry was the appellee's suggestion that (410 U.S. 124) "Roe's case must *now* be moot because she and all other members of her class are no longer subject to any 1970 pregnancy." (The case was argued December 13, 1971, and reargued October 11, 1972.) After pointing out that "[t]he usual rule in federal cases is that an actual controversy must exist at stages of *appellate or certiorari review*, and not simply at the date the action is initiated * * *" (410 U.S. 125, emphasis added), the Court pointed out that pregnancy, because of its relatively limited duration,

normally would not exist until the "appellate" process is completed. Because of this inexorable fact of life, the Court observed (410 U.S. 125) that "* * * If that termination makes a case moot, pregnancy litigation seldom will survive *much beyond* the *trial stage*, and appellate review will be effectively denied * * *." (Emphasis added.) For this reason, coupled with the normal biological phenomenon that the *same woman* repeatedly experiences pregnancy, the Court applied the "Continuing Controversy Doctrine" to demonstrate the existence of standing and "non-mootness" at the *appellate review* stage. The familiar apothegm—"capable of repetition, yet evading review"—is declared for emphasis, and four cases are recited as supportive.

In addition to the fact that the Court is speaking strictly about standing at the *appellate* stage, several other observations are pertinent. It will be noted that the buttressing authorities cited by the Court each concern the question of "mootness" or "standing" only at the *appellate* stage. (410 U.S. 125.) No question of "trial standing" or "trial mootness" was raised by the parties. Further, the decisional history of the "continuing controversy" exception relates to the *appellate* stage and not pre-trial situations. This is readily apparent from the long (and numerous) line of decisions dealing with the exception and its logical purpose. And, besides the Court expressly saying that it is dealing with mootness at the appellate stage, as before pointed out, at another part of its opinion when *sua sponte* discussing *trial stage* standing, it first finds the fact to be that Roe *was pregnant at trial* and cites prior decisions each requiring the actual status *at trial* to be as issuably pleaded in the Complaint as a basis for relief.

Here the doctrine of "continuing controversy" has no rational application. The question here is not respondent's *appellate* standing but her *trial* standing. There is no basis for or possibility of, "trial" of her Complaint as a pregnant litigant. This was absolutely foreclosed by her own voluntary act—*before trial*. The support of the United States Supreme Court points out for the pregnancy of Roe at trial by her affidavit is, of course, nonexistent here. As a matter of fact the opposite is true for the respondent's affidavit (in support of her motion for summary judgment) filed here, although at the time (October 5, 1973) apparently neither the District Court or petitioners noticed the absence of any positive recital of pregnancy such as was contained in the Complaint because of its otherwise false and deceptive nature.

Because of their use by the United States Supreme Court in the context of *trial standing*, the decisions cited in *Roe v. Wade* (410 U.S. 124) can be profitably referred to.

The first case cited is *Abele v. Merkle*, 452 F.2d 1121, l.c. 1125. This case markedly illustrates that in the context of contesting a claimed right to personal abortion, a woman must at least be pregnant. There the Court of Appeals said:

> Accordingly, we hold that non-pregnant female plaintiffs in this category do not show a sufficient nexus or present a sufficiently concrete issue in an adversary setting to give them standing, and we affirm the district court's dismissal of the complaint as to plaintiffs claiming standing solely on the basis of their child-bearing age.

At the outset the Court framed the issue of standing of the appellant lay women as a capacity to "present" a justiciable case. (See: 452 F.2d 1124, para. 1-3.) After reciting the controlling principles of "standing" and noting that none of this class of women were pregnant (according to their Complaint *and affidavits*), the Court ordered that the trial court's dismissal be affirmed with leave to amend the Complaint, only to women who *are pregnant*. In this context it is helpful to be reminded that courts do not adjudicate pleadings but *cases*, and this was the actual effect accomplished.

Citation of this case in *Roe v. Wade*, in the context of the Supreme Court's finding that "Jane Roe" was pregnant at trial, leaves no room for inference that the Supreme Court considered pregnancy at filing sufficient basis for standing where an abortion thereafter voluntary occurs before trial.

Crossen v. Breckenridge, 446 F.2d 833, is also consistent with petitioners suggested meaning of standing as explicated in *Roe v. Wade*. There the Court of Appeals of the case was within the frame of a denial of a complaint motion for appointment of a three-judge court by the District Court which determined a lack of standing and dismissed the complaint. As a consequence, the review of the appellate court was directed toward the record as it existed regarding the status of each party plaintiff at the time of the dismissal by the District Court. This status was solely and only discernible through inspection of the complaint since this was the extent of the record bearing on each appellant's "personal stake and interest," (*Barlow v. Collins*, 397 U.S. 159). The Court found that a pregnant woman (Pat Croddock) had standing, and a non-pregnant woman (Fran Pozzuto) lacked standing saying (446 F.2d 839):

> * * * It does not appear that this appellant presented more than a hypothetical case to the district court. Her only connection with the asserted right of marital privacy is that she may become pregnant in the future. This is not a sufficient nexus to distinguish her from any other woman capable of bearing children. No injury is alleged, actual or threatened, other than the hypothetical possibility that she may be denied an abortion should she become pregnant. Accordingly we hold that appellant Pozzuto does not have standing to challenge the Kentucky abortion statute under the federal Constitution. * * *

The same rule was applied to a women's rights organization. Parenthetically it can be noted that the "class status" of the dismissed out appellants did not lend justiciability or standing.

The third case cited in *Roe v. Wade* is *Poe v. Menghini*, 339 F.Supp. 986. This case contains the flat statement that the only two women involved as plaintiffs, Jane and Sally Poe, are "* * * at the time this action was commenced, were in need of abortions * * *" but unable to obtain them. (339 F.Supp. 989). The trial court (three-judge Dist. Ct.) fully heard the case and its recital of the facts gives every indication of the pregnancy of these women at trial hearing. The relief prayed for included injunctive relief relating to the inability of the women to secure a local legal abortion. While the Court did not mandate any specific relief to insure abortion, its reason was clearly *not because of the absence of pregnancy* of the concerned plaintiffs, but because the Court, in view of its declarations, felt injunctive relief to be unnecessary because of the presumption the defendants would comply with the declaration. Consequently, the case stands for the proposition it was utilized for by the United States Supreme Court, namely: pregnancy at time of trial adjudication is a constitutional requisite for standing and justiciability.

The final case cited on the point by the Supreme Court in *Roe v. Wade*, is *Truax v. Raich*, 239 U.S. 33, appears to be collaterally cited for its illustration of the approximity and facility of relief *pendente lite* to ensure the preservation of litigants' claimed constitutional rights until adjudication upon trial. Here, in this case, no temporary relief was prayed—no motion or other address to the trial court was made, because the actions of the respondent had rendered the matter hypothetical.

The pronouncements of the United States Supreme Court in *Roe v. Wade*, regarding the "Does" is contently equivalent to the here respondent's status than that of "Jane Roe." As is observed at "C" of the opinion (410 U.S. 127) "Mrs. Doe" who is not pregnant, and her husband asserted essentially the same claims as Jane Roe, but because of the wife's non-pregnant posture, relied upon present fear of future pregnancy without possibility of legal abortion as their basis for attack on the Texas

statutes. The Court determined they lacked standing saying (410 U.S. 128):

> But we are not prepared to say that the *bare allegation* of so indirect an injury is sufficient to present an actual case or controversy. (Emphasis added.)

Respondent, at best, upon trial, could only have proved the future possibility of pregnancy, and, except for the deception practiced by respondent in hiding her non-pregnant status, her allegation of pregnancy in this Complaint could have been stricken on motion. Moreover, such disparity between proof and pleading, obviates the latter averment as a significant legal declaration thereafter.

It would seem to necessarily follow that if the Court of Appeals' concept of standing were rationally applied, any individual woman, who was pregnant at any time (after *Roe v. Wade*) and claimed to have been illegally denied an abortion would be vested with standing regardless of her *non-pregnant* condition at the time of *filing*. Such an individual would have the same claim of "*injury*" as respondent here and could present at least an equivalent "status" as the respondent under the Court of Appeals' reasoning, and could just as fully benefit by a declaration of her Constitutional rights regarding an abortion even though it occurred before filing. Such a result is contrary to the unquestionable holdings in the cases cited by the Supreme Court in *Roe v. Wade*, supra, 410 U.S. 124, as authoritatively propounding the rule of lack of standing for non-pregnant litigants claiming Constitutional infringement of rights to abortion, and is hostile to the general requirements propounded requisite to Article III justiciability.

As a consequence of the force of the authorities, it appears that respondent's standing to litigate in the constitutional sense, was terminated when she, within five (5) days after filing suit and before trial, voluntarily caused her pregnancy to be aborted, and the Court of Appeals was without jurisdiction to do other than affirm the District Court.

CONCLUSION

Petitioners respectfully submit that the necessary legal effect of the Court of Appeals for the Eighth Circuit decisions here considered is to establish as a matter of Federal Constitutional absolute right of a woman to require a City to staff and equip its hospitals so as to accede to her demand for an abortion regardless of the fact that competent physicians determine that no medical reason exists for her abortion.

Further, the judicial conduct of the Court of Appeals employed in reaching its decisions were in violation of the operative rules for appellate courts and of the principles of fairness and the precepts of due process of law toward petitioners in adjudicating the case and in convicting and punishing by levying substantial penalties, and were arbitrary and in material abuse of lawful discretion.

Moreover, because of the absence of a Federal constitutional justiciable question, consequent upon the respondent's lack of standing and mootness of her claims, the Court of Appeals lacked jurisdiction to do other than to affirm the District Court in both appeals, and in failing this, acted contrary to Article III of the United States Constitution.

Therefore, we pray that because of the very important National effects of these decisions and the irregularity of the means employed by the Court of Appeals in reaching them, and the gross injustice to the petitioners they work, this Honorable Court ought to grant its writ of *certiorari* to review the case and declare the law.

Respectfully submitted

JACK L. KOEHR
City Counselor

EUGENE P. FREEMAN
Deputy City Counselor

Attorneys for Petitioners

APPENDIX

In the United States District Court
Eastern District of Missouri
Eastern Division

Jane Doe,
Plaintiff,
vs.
John H. Poelker, Mayor of the City of St. Louis, Missouri, and R. Dean Wochner, M. D., Director of the Department of Health and Hospitals and Acting Hospital Commissioner of the City of St. Louis, Missouri,
Defendants.
} No. 73 C 565 (A).

MEMORANDUM AND ORDER

(Filed March 22, 1974)

This matter is before the Court on the motion of the defendants, John H. Poelker, Mayor of the City of St. Louis, Missouri, and R. Dean Wochner, M.D., Director of the Department of Health and Hospitals and Acting Hospital Commissioner of the City of St. Louis, Missouri, to dismiss the plaintiff's complaint for lack of standing. Defendants' motion is based on the defendants' allegation that the plaintiff has undergone an abortion operation subsequent to the filing of her complaint and is no longer pregnant and that, therefore, plaintiff has no personal standing to continue this action on behalf of herself or as a representative of a class.

Plaintiff, on her own behalf and on behalf of the entire class of women similarly situated,[1] filed this action on August 17, 1973, pursuant to 28 USC 1343, 2201 and 2202 and 42 USC 1983, asking for a declaratory judgment and permanent injunction against the existence, application, implementation and enforcement of express and implied policies, rules, regulations, procedures and practices barring, thwarting, limiting and infringing upon the utilization of the personnel, facilities and services of the general public hospitals of the City of St. Louis, Missouri, for the performance of abortions. Plaintiff contends that such express and implied policies, rules, regulations, procedures and practices are in violation of her constitutional rights and the constitutional rights of the class of women similarly situated, as protected and guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.

In her complaint plaintiff alleges that she is a resident and taxpayer of the City of St. Louis, and that during the month of August, 1973, on two separate occasions she requested an abortion at Starkloff Memorial Hospital, a public hospital run by the City of St. Louis. Plaintiff further alleges that physicians of the obstetrical staff at Starkloff Memorial Hospital refused to perform an abortion operation on her and that the refusals were based upon the blanket policy of the public hospitals of the City of St. Louis against performing abortions except when necessary to save the life of the mother. On both occasions when the public hospital staff physicians refused to abort the plaintiff, they advised her to seek an abortion elsewhere and then return to the public hospital for a hysterectomy operation, because she suffers from cervical,

[1] The class was defined in plaintiff's complaint as consisting of pregnant women who are residents of the City of St. Louis, Missouri, and who desire to utilize the personnel, facilities and services of public hospitals within the City of St. Louis, Missouri, for the medical termination of their pregnancy.

fibroid tumors and polyps, a retroverted uterus, and trichomycosis.

In defendants' motion to dismiss they state that they have reason to believe that plaintiff has had an abortion and is no longer pregnant, based upon information reported in the press, radio and television. Defendants argue that when the plaintiff aborted her pregnancy she lost her standing to bring this action on her own behalf or on the behalf of the class the plaintiff purports to represent. What defendants are really saying is that upon termination of her pregnancy before trial in the District Court, plaintiff's claim became moot and should be dismissed for lack of standing. The defendants are correct in their belief that the plaintiff is no longer pregnant. This Court was informed by letter dated February 22, 1974, from plaintiff's counsel (the first paragraph of which letter is attached hereto and marked Exhibit 1), that the plaintiff's pregnancy was terminated by an abortion operation on August 22, 1973, which was five days after the plaintiff filed this action and before the summons in this case was served on the defendant, R. Dean Wochner, M.D. (Served August 28, 1973).

This issue presented by defendants' motion to dismiss which must be decided is whether the plaintiff, who was pregnant and had standing on the date she filed her complaint and who terminated her pregnancy by undergoing an abortion operation five days thereafter, still has standing to proceed in this cause in her own behalf or on the behalf of the class she purports to represent.

This Court recognizes that the pregnancy which gave rise to the present controversy herein has been resolved by the plaintiff's termination of her pregnancy, but that the underlying problem of the blanket policy against abortions in the public hospitals of the City of St. Louis still remains. This allegedly unconstitutional policy continues to deny abortions to members of the class plaintiff purports to represent.

This Court will first resolve the issue of whether the plaintiff can still represent the class of pregnant women she purports to represent in her class action allegation. In a very straightforward statement, the Supreme Court in *Bailey v. Patterson*, 369 U. S. 31, 32-33, 82 S. Ct. 549, 7 L. Ed. 2d 512 (1962), while referring to a group of plaintiffs, said, "They cannot represent a class of whom they are not a part. *McCabe v. Atchison, T. & S.F.R. Co.*, 235 U. S. 151, 162-163."

There is no dispute as to the fact that the plaintiff's pregnancy was terminated by an abortion operation on August 22, 1973, and that she is no longer pregnant. Therefore, she is no longer a member of the class she purports to represent (see Footnote 1).

This Court finds that this action should not be maintained as a class action. The prayer of the complaint is for a declaratory judgment holding that the policies, rules and regulations of the St. Louis City Hospitals which restrict the performance of abortions are unconstitutional under the First, Fourth, Fifth and Ninth and Fourteenth Amendments. The prayer also seeks a permanent injunction restraining the defendants from enforcing said policies, rules and regulations. No damages are requested on behalf of the plaintiff or on behalf of the class. The determination of the constitutional question can be made by the Court and the policies, rules and regulations determined to be constitutional or unconstitutional, regardless of whether this action is treated as an individual action or as a class action. No useful purpose would be served by permitting this case to proceed as a class action. See *Ihrke v. Northern State Power Company*, 459 F. 2d 566, 572 (8th Cir. 1972).

This Court must resolve the question of whether the plaintiff who had standing on the date she filed her complaint and who terminated her pregnancy by an abortion operation six days thereafter, still has standing to proceed in this cause in her own behalf.

The plaintiff contends that the Supreme Court in *Roe v. Wade*, 410 U. S. 113, 124-125, 93 S. Ct. 705, 35 L. Ed. 147 (1973) unequivocably answered the above question of mootness in the negative and the question of standing in the affirmative. Plaintiff quotes from *Roe v. Wade*, supra, l.c. 124 and 125, as follows:

> "A. Jane Roe. Despite the use of the pseudonym, no suggestion is made that Roe is a fictitious person. For purposes of her case, we accept as true, and as established, her existence; her pregnant state, as of the inception of her suit in March 1970 and as late as May 21 of that year when she filed an alias affidavit with the District Court; and her inability to obtain a legal abortion in Texas.
>
> "* * * * * * *
>
> "The appellee notes, however, that the record does not disclose that Roe was pregnant at the time of the District Court hearing on May 22, 1970, or on the following June 17 when the court's opinion and judgment were filed. And he suggests that Roe's case must now be moot because she and all other members of her class are no longer subject to any 1970 pregnancy.
>
> "The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated. *United States v. Munsingwear, Inc.*, 340 U. S. 36 (1950); *Golden v. Zwickler*, supra; *SEC v. Medical Committee for Human Rights*, 404 U. S. 403 (1972).
>
> "But when, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will

be effectively denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be 'capable of repetition, yet evading review.' *Southern Pacific Terminal Co. v. ICC*, 219 U. S. 498, 515 (1911). See *Moore v. Ogilvie*, 394 U. S. 814, 816 (1969); *Carroll v. Princess Anne*, 393 U. S. 175, 178-179 (1968); *United States v. W. T. Grant Co.*, 345 U. S. 629, 632-633 (1953).

"We, therefore, agree with the District Court that Jane Roe had standing to undertake this litigation, that she presented a justiciable controversy, and that the termination of her 1970 pregnancy has not rendered her case moot."

The plaintiff interprets the above quote from *Roe v. Wade*, supra, to mean that it is not necessary for the plaintiff to be pregnant at the time of trial to have standing and that termination of the plaintiff's pregnancy before trial does not render her claim moot. This Court does not agree with the plaintiff's interpretation. This Court calls attention to the only paragraph plaintiff omitted from the Supreme Court's discussion of standing and mootness in *Roe v. Wade*, supra, l.c. 124 and 125. This paragraph is of vital importance to the quote, and is as follows (l.c. 124):

"Viewing Roe's case as of the time of its filing and thereafter until as late as May" (the court is talking about May 21, 1970, the day before trial when plaintiff Roe filed an affidavit with the District Court) "there can be little dispute that it *then* presented a case or controversy and that, wholly apart from class aspects, *she, as a pregnant* single *woman* thwarted by Texas criminal abortion laws, had standing to challenge those statutes. *Abele v. Markle*, 452 F. 2d 1121, 1125 (CA2 1971); *Crossen v. Breckenridge*, 446 F. 2d 833, 838-839 (CA6 1971); *Poe v. Menghini*,

339 F. Supp. 986, 990-991 (Kan. 1972). See *Truax v. Raich*, 239 U. S. 33 (1915). Indeed, we do not read the appellee's brief as really asserting anything to the contrary. The 'logical nexus between the status asserted and the claim sought to be adjudicated,' *Flast v. Cohen*, 392 U. S. at 102, and the necessary degree of *conteniousness, Golden v. Zwickler*, 394 U. S. 103 (1969), are both present." (Emphasis added.)

Abele v. Markle, supra, cited in the omitted paragraph, is a case involving the constitutionality of an abortion statute, where the Court held that in order to demonstrate Federal standing to assert a personal claim the plaintiff had to allege and prove that she was pregnant. In the words of the Court in *Abele v. Markle*, supra, l.c. 1125:

"Accordingly we hold that nonpregnant female plaintiffs in this category do not show a sufficient nexus or present a sufficiently concrete issue in an adversary setting to give them standing, * * *."

In *Crossen v. Breckenridge*, supra, l.c. 829, the Court likewise reiterated the crucial element of "personal stake" in the outcome of the case and controversy, and held that where the woman was not pregnant, she had no standing. The same rationale is evident in *Poe v. Menghini*, see 339 F. Supp., l.c. 990.

In *Roe v. Wade*, supra, the Court at pp. 127-129, in discussing the standing of the Does, who were among the plaintiffs, held that where the wife was not pregnant at the time the cause was filed and based their claim on the fact Mrs. Doe might become pregnant, the District Court had appropriately dismissed their claim for lack of standing.

In *Golden v. Zwickler*, 394 U. S. 103, 108, 89 S. Ct. 956, 22 L. Ed. 2d 113 (1969) (relied on by the Supreme Court in *Roe v. Wade*, supra), the Supreme Court said:

"The District Court erred in holding that Zwickler was entitled to declaratory relief if the elements essential to that relief existed '[w]hen this action was initiated.' The proper inquiry was whether a 'controversy' requisite to relief under the Declaratory Judgment Act existed *at the time of the hearing* on remand. We now undertake that inquiry.

" '[T]he federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues, "concrete legal issues, presented in actual cases, not abstractions," are requisite. This is as true of declaratory judgments as any other field.' *United Public Workers of America v. Mitchell*, 330 U. S. 75, 89 (1947). 'The difference between an abstract question and a "controversy" contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.' *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U. S. 270, 273 (1941)." (Emphasis added.)

The Court went on in *Golden v. Zwickler*, supra, l.c. 110, to say that constitutional questions must be presented to the courts in the context of a specific live grievance, and said:

> "No federal court, whether this Court or a district court, has 'jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, *except as it is called upon to adjudge the legal rights of litigants in actual controversies.' Liverpool, N.Y. & P.S.S. Co. v. Commissioners*, 113 U. S. 33, 39 (1885). (Emphasis added.) See also *United States v. Raines*, 362 U. S. 17, 21 (1960). The express limitation of the Declaratory Judgment Act to cases 'of actual controversy' is explicit recognition of this principle."

The application of the above cited cases to the instant fact situation brings this Court to the conclusion that the plaintiff herein does not have standing to proceed with her cause of action because she is no longer pregnant. The plaintiff's claim is no longer in the context of a specific live grievance as required by *Golden v. Zwickler*, supra.

The plaintiff cannot now nor at the time of this case would be heard show a substantial live controversy of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. This is not to say that the issue the plaintiff brings to this Court is not justiciable but is only to say that plaintiff is not a proper party to request an adjudication. *Flast v. Cohen*, 392 U. S. 83, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968).

This Court finds not only that plaintiff lacks standing but that the termination of her pregnancy before even service was had on one of the defendants and before the trial, has rendered her claim moot. Plaintiff contends that the Supreme Court in *Roe v. Wade*, supra, l.c. 125, quoted above, is holding that termination of pregnancy before trial does not render a plaintiff's claim moot. This is not the case with respect to the trial court. In *Roe*, at page 125, the Supreme Court in discussing the question of "mootness" was referring to the "appellate process" rather than the trial status of a litigant. The Court there in effect held that where a plaintiff had standing at trial a change in her position after judgment (that is, abortion or coming to full term) should not deprive her of the right to the appellate process of our courts because "[i]t truly could be 'capable of repetition, yet evading review.' " *Roe v. Wade*, supra, l.c. 125.

There are many appellate decisions similar to the *Roe* case where situations are involved that made mootness inapplicable because to do so would prevent appellate courts passing on the question involved because of the time involved between the trial in the trial court and the consideration on appeal, but we are not dealing with that controversy at the trial level, and such rule has not been applied to the trial courts.

Accordingly, for the above reasons stated, the defendants' motion to dismiss for lack of standing is sustained.

/s/ Roy W. Harper
U. S. District Judge

Susman Willer & Rimmel
Attorneys at Law
705 Olive Street—Suite 1212
St. Louis, Mo. 63101

February 25, 1974

The Honorable Roy W. Harper
United States District Judge
United States Court and Customs House
1114 Market Street
St. Louis, Mo. 63101

Re: *Doe v. Poelker, et al.*,
Cause No. 73C 565(A)

Dear Judge Harper:

This letter shall serve to provide the Court with firm authority as to a continuing, justiciable controversy, despite the termination of plaintiff's pregnancy on or about August 22, 1973 and for the authority as to the proper party defendants.

United States Court of Appeals
For the Eighth Circuit

No. 74-1232

Jane Doe,
Appellant,
v.
John H. Poelker, Mayor of the City of St. Louis, Missouri, and R. Dean Wochner, M.D., Director of the Department of Health and Hospitals and Acting Hospital Commissioner of the City of St. Louis, Missouri,
Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: May 17, 1974

Filed: June 4, 1974

Before Bright and Ross, Circuit Judges, and Talbot Smith, Senior District Judge.*

Ross, Circuit Judge.

This is an action for a declaratory judgment and a permanent injunction against implementation of the policies, rules, regulations and procedures barring the performance of abortions in the two public hospitals in the City of St. Louis, Missouri. From an order dismissing the complaint for lack of standing and mootness, Doe appeals. For the reasons hereinafter expressed, we reverse.

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* Talbot Smith, Senior District Judge, Eastern District of Michigan, sitting by designation.

Jane Doe alleged in her complaint, and verified by way of affidavit, that she was pregnant, was the mother of two children, was in severe financial straits, and was suffering from cervical fibroid tumors and polyps, a retroverted uterus, and trichomycosis. Twice she consulted staff members at Starkloff Memorial Hospital, owned and operated by the City of St. Louis, and was advised that she would require a hysterectomy. They told her to procure an abortion elsewhere and then return to the hospital for the hysterectomy. The reasons proffered by the hospital for the two-operation recommendation was the hospital's stated policy[1] against performing abortions. Doe thereupon commenced this action against the Mayor of St. Louis and the Director of the Department of Health and Hospitals on her own behalf and on behalf of the entire class of pregnant women residents of the City of St. Louis, Missouri, desiring to utilize the personnel, facilities and services of the general public hospitals within the City of St. Louis for the termination of pregnancies.

After the complaint had been filed and service perfected upon one of the defendants, but before service on the other defendant, Doe procured an abortion from an alternative source.[2]

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[1] That policy is expressed in the defendants' joint answer:

> 10. Abortion, for reasons other than to save the mother from grave physiological injury or death, is against and contrary to the laws and public policy of the State and City.
>
> * * * * * * *
>
> 12. [A]bortion, other than to protect the mother from grave physiological injury or death, is a medical procedure which lawfully can and has been reasonably excluded from such services given by the City's hospitals.

[2] This fact was verified to the court by Doe's counsel. Throughout the litigation her counsel has sought to protect Doe's true identity in order to avoid harassment. However, counsel has assured the court that Doe remained ready and able for deposition or other discovery procedures. Counsel's assurances and the fact that Doe herself, under her pseudonym signature, has filed an affidavit affirming the veracity of the relevant facts, permits us to accept as true, her existence and her pregnant state at the commencement of this action. *See Roe v. Wade*, 410 U.S. 113, 124 (1973); *Doe v. Bolton*, 410 U.S. 179, 187 (1973).

Defendants thereafter moved the court to dismiss Doe's complaint for lack of standing.[3] In granting defendants' motion, the court held that, by virtue of the fact that Doe had obtained an abortion, Doe was no longer a member of the class she purported to represent. The court then ordered that Doe could not represent the class of pregnant female residents of St. Louis. Next, the court determined that although she may have had standing to proceed on her own behalf on the date she filed her complaint, her individual case had become moot after she procured an abortion. *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973), compel a different result on both standing and mootness.

The question of standing in the federal court is to be considered in the framework of Article III which restricts the judicial power to "cases" and "controversies." *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 151 (1970). In terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution. *Flast v. Cohen*, 392 U.S. 83, 101 (1968). The prerequisites of standing are a "logical nexus between the status asserted and the claim sought to be adjudicated." *Flast v. Cohen, supra*, 392 U.S. at 102, and the necessary degree of contentiousness, *Golden v. Zwickler*, 394 U.S. 103, 108 (1969).

These requirements are met on these facts. Plaintiff's injury and that of her class is her inability to obtain an abortion prior to fetal viability in St. Lous public hospitals free from regulations other than those that advance interests in maternal health. The interest sought to be protected is the constitutionally guaranteed right to an abortion prior to viability. The defendants

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[3] This motion was brought six months after the filing of the complaint and presumably upon defendants' first notice that Doe had obtained an abortion.

are attempting to regulate that interest by the challenged rules and policies of the hospital which inhibit and (in effect) proscribe abortions.

This conclusion that Doe has standing is mandated by the resolution of the identical issue in *Roe v. Wade, supra,* 410 U.S. at 124, and *Doe v. Bolton, supra,* 410 U.S. at 187. Each of the plaintiffs in those actions was, like the plaintiff here, not shown to have been pregnant at the time of the district court hearing. Likewise, each of the plaintiffs was, at the relevant time, precluded from implementing her previability abortion decision by the challenged statutes and regulations. In *Roe,* the Supreme Court said:

> Viewing Roe's case as of the time of its filing and thereafter until as late as May [yet prior to the May 22 district court hearing], there can be little dispute that it *then* presented a case or controversy and that, wholly apart from the class aspects, she, as a pregnant single woman thwarted by the Texas criminal abortion laws, had standing to challenge those statutes. . . . The "logical nexus between the status asserted and the claim sought to be adjudicated," and the necessary degree of contentiousness are both present.

Id. at 124 (emphasis supplied and citations omitted). The court thereupon found that Roe had standing to undertake the litigation. *Id.* at 125. A similar result was reached in *Doe v. Bolton* where it was concluded that Doe's pregnant state on the date of the commencement of the action gave her standing to maintain the action. *Id.* at 187. Recently, in *Doe v. Israel,* 482 F.2d 156, 158 (1st Cir. 1973), *cert. denied,* 42 U.S.L.W. 3627 (May 13, 1974), the First Circuit has said:

> In response to questioning defendant essentially suggests only one: that plaintiffs, no longer being pregnant, have no sufficient interest or standing. In the light of *Roe,* this argument proves too much.

> We consider that defendant's claim of mootness is a will-o'-the-wisp and assumes the very question at issue. If a plaintiff has a right to terminate her pregnancy—which is the legal question before us—the sooner she succeeds in doing so, the better. We have in mind the trimester trilogy, on which defendant relies in another connection, and its effect on viability and the pregnant plaintiff's health. It seems not only illogical but, to use a polite word, harsh, to argue that in order to establish her right to an abortion a woman must decline to have it. (Citation omitted.)

We conclude here that Doe has standing to challenge the hospital policy. Moreover, since she has adequate standing to proceed in her own behalf, on the authority of *Doe v. Bolton, supra,* 410 U.S. at 188, Doe and her class can be recognized.

Separate and distinct from standing is the doctrine of mootness. That question is also a product of the Article III requirement of a case of controversy. *North Carolina v. Rice,* 404 U.S. 244, 246 (1971). The usual rule in federal cases is that an actual controversy must exist at all stages of appellate or certiorari review, and not simply at the date the action is initiated. *SEC v. Medical Committee for Human Rights,* 404 U.S. 403, 406 (1972); *Golden v. Zwickler, supra,* 394 U.S. at 108; *United States v. Munsingwear, Inc.,* 340 U.S. 36, 39 (1950). However, a case presenting a question that is "capable of repetition, yet evading review," is nevertheless amenable to federal adjudication even though it might otherwise be considered moot. *Southern Pacific Terminal Co. v. ICC,* 219 U.S. 498, 515 (1911). As is clear from the Supreme Court's treatment in *Roe* and *Doe,* pregnancy is one of the exceptional situations exempted from the usual rule.

In *Roe,* the Court said:

> But when, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is

> so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be "capable of repetition, yet evading review."

Id. at 125 (citations omitted). The Court accepted as true Roe's pregnant state as of the inception of her suit. The Court did not find, however, that Roe was likewise pregnant at the time of the trial court's hearing on May 22, 1970. Yet, based upon the foregoing reasoning, the Court held that she presented a justiciable controversy and "the termination of her 1970 pregnancy ha[d] not rendered her case moot." *Id.* at 125. Likewise in *Doe v. Bolton, supra,* 410 U.S. at 187, the Court accepted the plaintiff's pregnant state on the date of the filing of the complaint and thereupon held, on the basis of the decision in *Roe,* that the interim termination of her pregnancy had not rendered the case moot. To interpret the Supreme Court's discussion of mootness, as the district court did here, to require pregnancy to be established at the time of trial, would be to permit frustration of the logic announced by the Supreme Court. Through dilatory tactics opposing counsel could effectively preclude review of the challenge until abortion or birth terminated the pregnancy. Crowded dockets could cause the same unfortunate result. Accordingly, we find that the plaintiff Jane Doe in this case presents a justiciable controversy and the termination of her pregnancy sometime after the filing of the complaint, but prior to trial, does not render her case moot.

For the reasons hereinbefore expressed, we reverse and remand to the district court for further proceedings consistent

with the views expressed in this opinion and in our opinion in *Nyberg v. City of Virginia,* No. 73-1686 (8th Cir. Feb. 19, 1974).

A true copy.

Attest: ROBERT C. TUCKER

Clerk, U. S. Court of Appeals, Eighth Circuit

(Seal)

United States Court of Appeals
For the Eighth Circuit

74-1232 September Term, 1973

Jane Doe, Appellant,
vs.
John H. Poelker, Mayor of the City of St. Louis, Missouri, et al., Appellees.

Appeal from the United States District Court for the Eastern District of Missouri

(Filed June 27, 1974)

The Court having considered petition for rehearing en banc filed by counsel for appellees and, being fully advised in the premises, it is now here ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is now here ordered that the petition for rehearing also be, and it is hereby, denied.

June 27, 1974

A True Copy.

Attest: ROBERT C. TUCKER

Clerk, U. S. Court of Appeals, 8th Circuit

(Seal)

In the United States District Court
Eastern District of Missouri
Eastern Division

Jane Doe, Plaintiff,
vs.
John H. Poelker, Mayor of the City of St. Louis, Missouri, and R. Dean Wochner, M. D., Director of the Department of Health and Hospitals and acting Hospital Commissioner of the City of St. Louis, Missouri, Defendants.

No. 73C 565 (A)

MEMORANDUM AND ORDER

(Filed January 13, 1975)

This is an action by plaintiff seeking to have declared as unconstitutional those rules and regulations of the public hospitals of the City of St. Louis, Missouri, which prohibit utilization of city hospital facilities and personnel for the performance of abortions except for medical reasons.

Plaintiff, suing under the pseudonym of Jane Doe, is a married woman who was pregnant at the time of the filing of the complaint. Defendants are John H. Poelker, Mayor of the City of St. Louis, Missouri, and R. Dean Wochner, Director of Health and Hospitals for the City of St. Louis.

Plaintiff brings this cause of action on her own behalf and on behalf of the entire class of women who reside in St. Louis

and desire to utilize the services of the St. Louis public hospitals in order to obtain abortions. Jurisdiction of this Court is invoked pursuant to 28 USC 1343, 2201 and 2202, and 42 USC 1983. Plaintiff contends that on two separate occasions during August of 1973 she sought an abortion at Starkloff Memorial Hospital, a public hospital run by the City of St. Louis, but was refused based upon the hospital's policy against performing non-therapeutic abortions. Such policy is alleged to be violative of various constitutional rights, including the right to privacy within the patient-physician relationship; the right to obtain medical services; the right to determine whether to bear children and maintain marital privacy; the right to receive adequate medical advice pertaining to pregnancy; and the right to equal protection and due process of law. Plaintiff seeks a judgment declaring invalid all policies and regulations of the St. Louis public hospitals which restrict the use of their personnel, services and facilities for the performance of non-therapeutic abortions, and requests that defendants be permanently enjoined from enforcing such policies.

St. Louis operates two general public hospitals, Max C. Starkloff Hospital and Homer G. Phillips Hospital, designated City Hospital Numbers 1 and 2, respectively. The policy regarding performance of abortions in the city hospitals in embodied in the hospital by-laws, which provide that abortions shall be performed only for "medical reasons" (Defendants' Answer to Plaintiff's Interrogatory No. 1). This policy was in effect at both St. Louis public hospitals at all times relevant to this lawsuit, and remains in effect today.

At trial plaintiff testified that she has two children and has miscarried five times since being married in 1965. In 1973 her husband was arrested for a felony and faced with possible imprisonment. In July, 1973, plaintiff missed her menstrual period and on August 7th she went to the gynecology clinic at St. Louis City Hospital Number 1 to determine if she was

pregnant. At the clinic she was examined by a third-year medical student assigned to the hospital. Plaintiff testified that she inquired about abortion services at that time, although the student who examined her had no recollection of such a conversation. That examination disclosed no medical justification for an abortion.

On August 13th, plaintiff returned to the gynecology clinic for the results of her laboratory test. Upon being told she was pregnant she requested that the hospital perform an abortion. The medical student who examined her on this occasion testified that he found nothing to indicate that an abortion should be performed. He stated at trial that he was not aware of the city's policy against abortions, but told plaintiff that he did not know of anyone at the hospital to refer her to that was not opposed to abortion for moral reasons. However, he made an appointment for her to visit the obstetrics clinic the next day.

On August 14, 1973, plaintiff was interviewed by Dr. William J. Ott at the Starkloff Hospital (City Hospital Number 1) obstetrics clinic, who told her that her medical condition did not indicate that an abortion was necessary, and that his personal beliefs precluded him from performing abortions. Plaintiff was examined the same day and again on August 15th by Dr. Ziad Abu Dalu, who confirmed that there were no medical reasons to justify termination of her pregnancy and that the hospital could not comply with her request for an abortion. Although Dr. Dalu did not discuss his personal beliefs with plaintiff at that time, the record discloses that as a member of the Moslem faith Dr. Dald would refuse to participate in an abortion.

The instant suit was filed August 17, 1973. Subsequently, on August 22nd, plaintiff procured an abortion at a private St. Louis abortion clinic.

Plaintiff now contends that the above policy of the St. Louis City public hospitals contravenes certain recent court decisions which deal with the constitutionality of abortion regulation. Defendants maintain that such a policy is in violation of neither express nor judicially established constitutional principles. In addition, defendants state that continued enforcement of this policy has since 1973 been supported by Missouri statute, to wit, RSMo 197.032, which was passed in that year and which provides in part:

> "1. No physician or surgeon, registered nurse, practical nurse, midwife or hospital, public or private, shall be required to treat or admit for treatment any woman for the purpose of abortion if such treatment or admission for treatment is contrary to the established policy of, or the moral, ethical or religious beliefs of, such physician, surgeon, registered nurse, midwife, practical nurse or hospital. No cause of action shall accrue against any such physician, surgeon, registered nurse, midwife, practical nurse or hospital on account of such refusal to treat or admit for treatment any woman for abortion purposes."

Plaintiff does not seek to challenge RSMo 197.032 in this proceeding.

Plaintiff has cited to this Court the recent companion Supreme Court case of *Roe v. Wade*, 410 U. S. 113 (1973), and *Doe v. Bolton*, 410 U. S. 179 (1973), which established the principle that a woman has a qualified right to obtain an abortion, which may override the state's interest in restricting her decision during early stages of pregnancy. The Court's attention is also directed to the subsequent Eighth Circuit Decision of *Nyberg v. City of Virginia*, 495 F. 2d 1342 (1974). In that case the Court was presented with a request from two duly licensed physicians that they be permitted to use the facilities of the public municipal hospital at Virginia, Minnesota, in

order to perform abortions on their patients who desired such services. Although plaintiffs were members of the hospital staff, they were precluded from performing abortions there by a hospital resolution similar to that in effect at the St. Louis City public hospitals.

In *Nyberg* the Eighth Circuit Court of Appeals first stated that the abortion procedure was no more complicated than other surgical procedures which the plaintiff-physicians were permitted to perform at the hospital. In ruling in favor of the doctors, the Court went on to say at page 1346:

> "It would be a nonsequitur to say that the abortion decision and its effectuation is an election to be made by the physician and his patient without interference by the state and then allow the state, through its public hospitals, to effectively bar the physician from using state facilities to perform the operation."

Plaintiff now claims that under the authority of these decisions, a public hospital must be required to provide facilities and personnel to any woman requesting that such hospital perform an abortion on her. This Court does not believe that the above cases were intended to establish such a broad proposition as that now urged by plaintiff.

In *Doe v. Bolton*, supra, the Supreme Court invalidated certain portions of Chapter 26-12 of the Georgia Criminal Code on grounds that it was over-restrictive of the circumstances under which a physician could perform an abortion. However, the Court explained at page 189 that:

> "Roe v. Wade, supra, sets forth our conclusion that a pregnant woman does *not* have an absolute constitutional right to an abortion on her *demand*." (Emphasis added.)

Furthermore, in *Doe* the Court let stand section 26-1202(e) of the Georgia statute which provided as follows:

"Nothing in this section shall require a hospital to admit any patient under the provisions hereof for the purpose of performing an abortion, nor shall any hospital be required to appoint a committee such as contemplated under subsection (b)(5). A physician, or any other person who is a member of or associated with the staff of a hospital, or any employee of a hospital in which an abortion has been authorized, who shall state in writing an objection to such abortion on moral or religious grounds shall not be required to participate in the medical procedures which will result in the abortion, and the refusal of any such person to participate therein shall not form the basis of any claim for damages on account of such refusal or for any disciplinary or recriminatory action against such person."

With regard to this provision, which is very similar to RSMo 197.032, the Supreme Court stated at pages 197-198 of its opinion:

> "Under § 26-1202(e), the hospital is free *not to admit* a patient for an abortion. * * * Further, a physician or any other employee has the right to refrain, for moral or religious reasons, from participating in the abortion procedure. * * * § 26-1202(e) affords adequate protection to the hospital * * *." (Emphasis added.)

It is, therefore, axiomatic that no physician or other hospital employee may be compelled to perform an abortion in violation of his personal beliefs. *Nyberg* merely held that where a physician on the staff of a public hospital desired to perform a non-therapeutic abortion, the state could not place an absolute bar on that decision. The Court concluded at page 1347 of that opinion:

> "[W]hile we propose to fashion no specific procedures which must be followed *nor to require any individual staff members to participate in* abortion procedures, we do so hold that the hospital facilities must be made available for abortion services, as they are for other medical procedures, *to those physicians* and their patients who have a right to and *request* such facilities." (Emphasis added.)

A careful reading of the *Nyberg* decision discloses that it falls far short of holding that a hospital, albeit open to the public, must be forced to furnish physicians for women desiring to obtain abortions. The Court was careful to point out that:

> "Contrary to the view taken by appellant, Roe and Doe do not suggest *and no hospital need provide* facilities for an abortion merely upon a mother's demand." (Emphasis added.) 495 F. 2d at page 1346, footnote 5.

In the instant case this Court is not presented with a request from any physician desirous of using the St. Louis City hospital facilities in order to perform an abortion upon his patient. Nor is there anything in the record to show that there is any physician presently on the staff of either public hospital in St. Louis who is willing to admit the plaintiff as his patient for such a purpose. To the contrary, all of the medical personnel who examined plaintiff at Starkloff Hospital stated emphatically that they hold strong personal beliefs against abortion, and at one point plaintiff was told that there was no one to refer her to who was willing to perform such a procedure in the absence of any medical justification.

In effect, plaintiff is asking this Court to hold that the City of St. Louis must provide someone to take care of any woman who requests an abortion at one of its hospitals. Such a holding would be clearly contrary to established constitutional principles, and this Court will issue no order designed to have such an effect.

This memorandum opinion is adopted by the court as its findings of fact and conclusions of law, and the clerk of the Court is directed to prepare and enter the proper order finding for the defendants.

/s/ ROY W. HARPER
U. S. District Judge

United States Court of Appeals
for the Eighth Circuit
St. Louis, Mo. 63101

April 14, 1975

Robert C. Tucker, Clerk
Mr. Jack L. Koehr
City Counselor
Room 314, City Hall
1200 Market Street
St. Louis, Missouri 63103

Re: No. 75-1069. Doe v. Poelker.

Dear Sir:

Enclosed herewith, for use of counsel, printed copy of the opinion of this Court filed today in the above case. Judgment of this Court in accordance with the opinion is also entered today.

Very truly yours

/s/ ROBERT C. TUCKER
Clerk

enc.

United States Court of Appeals for the Eighth Circuit

No. 75-1069

Jane Doe, et al., Appellants,

v.

John H. Poelker, Mayor of the City of St. Louis, Missouri, and R. Dean Wochner, M.D., Director of the Department of Health and Hospitals and Acting Hospital Commissioner of the City of St. Louis, Missouri, Appellees.

Appeal from the United States District Court for the Eastern District of Missouri

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Submitted: March 14, 1975

Filed: April 14, 1975

Before Van Oosterhout, Senior Circuit Judge, Ross, Circuit Judge, and Talbot Smith, Senior District Judge.*

Ross, Circuit Judge.

Jane Doe,[1] a pregnant resident of St. Louis, Missouri, at the

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* Talbot Smith, Senior District Judge, Eastern District of Michigan, sitting by designation.

[1] "Jane Doe" is a pseudonym for the actual plaintiff. It has been utilized throughout this litigation to protect her true identity in order to avoid harassment due to the controversial nature of the subject matter of this action.

time the lawsuit was filed, brought this civil rights class action under 42 U.S.C. § 1983 against John H. Poelker, the Mayor of St. Louis, and Dr. R. Dean Wochner, the Director of the Department of Health and Hospitals and Acting Hospital Commissioner of St. Louis [hereinafter referred to collectively as "the city"] seeking, in her broadly worded complaint, declaratory and injunctive relief

> against the existence, application, implementation and enforcement of express and implied policies, rules, regulations, procedures and practices barring, thwarting, limiting and infringing upon the utilization of the personnel, facilities and services of the general, public hospitals of the City of St. Louis, Missouri . . . for the performance of abortions.

The jurisdiction of the federal court was based on 28 U.S.C. § 1343.

On March 22, 1974, the district court[2] sustained a motion by the city and dismissed the complaint for lack of standing and mootness. On appeal this Court reversed and remanded for further proceedings. *Doe v. Poelker*, 497 F.2d 1063, 1067 (8th Cir. 1974).

Accordingly, a trial to the court was held on November 25, 1974, and on January 13, 1975, the court issued a memorandum and order finding for the city and dismissing the complaint with prejudice. The trial judge appears to have agreed with Doe that there is a city policy prohibiting abortions, but he never considered the constitutionality of such a policy because he felt that Doe had failed to establish that the policy had been applied to her. Instead, it was his opinion that Doe had merely been refused an abortion by certain physicians at the

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[2] The Honorable Roy W. Harper, Senior United States District Judge, Eastern District of Missouri.

city hospital's obstetrics-gynecology clinic because of their own personal moral and ethical beliefs on that subject. We reverse.

The incidents giving rise to this litigation occurred during August, 1973. Doe, the mother of two who was in severe financial straits and who had reason to fear that her husband might be sent to prison, suspected she might be pregnant. She had had five prior miscarriages. She went to the gynecology clinic at Max C. Starkloff Hospital, owned and operated by the city, and was examined by a third-year medical student assigned to the hospital. Although the student did not recall the conversation, Doe testified that she asked him at that time if she could obtain an abortion at the city hospital and that he had responded that it could not be done because it was against hospital policy. Doe returned to the clinic six days later for the results of the laboratory pregnancy test, and when informed by another medical student who was examining her that the results was positive she requested an abortion at the hospital. The student indicated that he had personal convictions against abortions and that he knew of no one at the city hospital to whom to refer Doe. However, an appointment was made for the next day at the obstetrics clinic.

At that clinic Doe was seen by Dr. William J. Ott, at that time the chief resident from St. Louis University in the obstetrical service at the city hospital. She told Dr. Ott that she desired an abortion. Dr. Ott, having strong personal beliefs on the subject, refused to consider it and refused to give her even a written statement as to her state of pregnancy. Instead he referred her to another physician at the clinic, Dr. Ziad Abu Dalu, who saw her that same day and the next. Both times Doe requested an abortion at city hospital and Dr. Abu Dalu refused, telling her "that we couldn't do one at City Hospital." Dr. Abu Dalu does have personal convictions against abortions, but did not elaborate them to Doe. Subsequent to the filing of this lawsuit, Doe was aborted at a private clinic in St. Louis.

While the students and doctors who saw Doe at the clinic were aware of her personal family and financial problems none of them found any "medical reasons" to justify an abortion, defining such reasons as severe sickness of the patient such as "severe diabetes," "severe heart condition" or "something of that type." Doe was suffering from cervical fibroid tumors and polyps, an extremely retroverted uterus and trichomycosis.

The district court impliedly found, and there can be no doubt, that there is an official St. Louis city policy promulgated by the mayor prohibiting the performance of abortions in the city-owned public hospitals for reasons other than to save the mother from grave physiological injury or death. The city admitted as much in its answer to the complaint, and the mayor himself testified that, upon taking office in the spring of 1973, he directed that the existing policy be continued, understanding that it allowed abortions only if the life of the mother was in danger.[3] Additionally, Dr. Wochner stated that such a policy had been given to him by the mayor to carry out.

In addition to the policy, the evidence reveals that there is a "procedure and practice" which operates to bar the performance of abortions at the city's hospitals—the method of staffing the obstetrics-gynecology clinic.[4] The clinic, which is provided by

[3] It is noteworthy that this specific directive was promulgated by Mayor Poelker several months *after* the Supreme Court's abortion decisions were announced on January 22, 1973. *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973).

[4] From exchanges which occurred during the trial it appears that the district judge thought the complaint was not broad enough to cover an attack on the staffing of the OB-GYN clinic. We disagree. The complaint specifically mentions "procedures and practices" which thwart the performances of abortions as being under attack. The manner of staffing a hospital is certainly a "procedure and practice" of that hospital. And, of course, any complaint must be read in the light of Fed. R. Civ. P. 8(f), which states that "[a]ll pleadings shall be so construed as to do substantial justice."

The city can hardly complain that it was surprised by the staffing issue in view of the broad wording of the complaint. It certainly knew that the gravamen was an attack on everything the city did which had the effect of keeping abortions from being performed in its hospitals. And when Doe put on evidence relating to staffing, the city did not ask for a continuance or attempt to offer any contrary evidence of its own.

the city, at least in part, to care for indigent patients, is staffed entirely by faculty and students from the St. Louis University School of Medicine. That university is a Catholic, Jesuit-operated institution, and its faculty manual calls for the discharge of any faculty member who engages in "[a]ll grave offense in the discharge of University responsibilities, which is clearly against well-established principles of Catholic morality." One witness, a Jesuit professor at the university, testified that the performance of an abortion by a faculty member would be a "gravely immoral [act] by the Catholic standards." As such, of course, it would subject him to discharge.

Dr. Frank Ostapowicz, a professor at the School of Medicine and Chief of Gynecological and Obstetrical services at the city hospital testified by affidavit that he had told the city's Director of Health and Hospitals (Dr. Wochner) that

> neither I, those under my direction and supervision, or St. Louis University Medical School with which we were (and are) all associated, would participate in providing abortion services to women who did not have true medically grave reasons which furnished professionally ethical and moral justification for such procedure.

The result of this staffing exclusively from St. Louis University, together with the official policy of the city, is that indigent pregnant women who desire abortions are unable to find a physician at the city OB-GYN clinic who will perform one.[5]

[5] The city operates two general hospitals, Max C. Starkloff Hospital and Homer G. Phillips Hospital. The OB-GYN clinic to which Doe went was at Starkloff, and it is staffed as described in the text. There is some indication in the record that there is also an OB-GYN clinic at Phillips. There is no evidence regarding its staffing. How-

The official city policy and the "staffing procedure" were applied to Doe and the other members of her class and successfully prevented them from utilizing the city's hospitals to obtain abortions. Dr. Wochner testified that had it not been for the policy promulgated by the mayor he would have proceeded to implement the providing of abortions at the city's public hospitals. This evidence strongly suggests that had the policy not been extant, Doe could have obtained an abortion at the city hospital. Additionally, there is evidence that Doe was specifically told that she could not have an abortion at the city hospital, again indicating that it was the city policy which prevented the use of these facilities for that purpose. Likewise, it is clear that the staffing procedure effectively foreclosed any possibility that any pregnant women could ever find a staff physician who would agree to perform an abortion in the city hospital unless her life or health was in severe danger. The conclusion that Doe was not affected by the policy and the staffing procedure simply cannot stand in light of this evidence and the salient fact that, despite a number of requests, not a single abortion has been performed in the St. Louis public hospitals since before the Supreme Court's abortion decisions in January, 1973, to date.

The district court reasoned and the city contends on appeal that no woman has an absolute constitutional right to an abortion on demand and that, therefore, Doe has no right to demand that the clinic doctors at city hospital perform an abortion on her. Regardless of the merits of this argument, we think it misses completely the point of this litigation. Doe does not "demand" an abortion; but, rather, she asks that the city not

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ever, the evidence strongly indicates that Doe could not have received an abortion at Phillips. No abortions had been performed at either hospital since January, 1973. And when Doe told the physicians at the clinic that she desired an abortion they referred her to Planned Parenthood or to the counselors at Starkloff, *not* to the clinic at Phillips.

deny her equal protection of the law by interfering in her decision of whether to bear a child or have an abortion simply because she is indigent and unable to afford private treatment. Stripped of all rhetoric, the city here, through its policy and staffing procedure, is simply telling indigent women, like Doe, that if they choose to carry their pregnancies to term, the city will provide physicians and medical facilities for full maternity care; but if they choose to exercise their constitutionally protected right to determine that they wish to terminate the pregnancy, the city will not provide physicians and facilities for the abortion procedure, even though it is probably safer than going through a full pregnancy and childbirth. *Roe v. Wade*, 410 U.S. 113, 163 (1973). No rational or legally cognizable basis for this distinction is offered.[6] And it is certainly true that this distinctive treatment represents as much interference in the abortion decision of an indigent woman by the city as the prohibition of all nontherapeutic abortions in city-operated hospitals condemned by this Court in *Nyberg v. City of Virginia*, 495 F.2d 1342 (8th Cir.), *appeal dismissed*, 95 S.Ct. 169 (1974).

Such arbitrary governmental discrimination against indigent women choosing to have an abortion has been roundly denounced by the courts. *Wulff v. Singleton*, 508 F.2d 1211, 1215-1216 (8th Cir. 1974); *Doe v. Rose*, 499 F.2d 1112, 1115-1117 (10th Cir. 1974); *Doe v. Rampton*, 366 F.Supp. 89, 193 (D. Utah 1973) (3-judge court); *Klein v. Nassau County Medical Center*, 347 F.Supp. 496, 500-501 (E.D. N.Y. 1972) (3-judge court), *vacated and remanded for further consideration in light of Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973), 412 U.S. 925-926

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[6] The city had conducted no cost estimates or any other serious studies to see whether or not it was fiscally feasible to perform abortions in city hospitals. Dr. Wochner did testify that he thought it would generally be less expensive to perform an abortion than to deliver a baby. The only reason advanced by the mayor for his policy was his own personal conviction that abortion was tantamount to murder.

(1973). In the recent decision in *Wulff v. Singleton, supra,* 508 F.2d at 1215, the State of Missouri had by statute prohibited medicaid payments to women receiving welfare benefits who had undergone nontherapeutic abortions while, at the same time, providing such payments to women welfare recipients who carried their pregnancies to term. This Court stated: "This classification is a clear violation of the Equal Protection Clause of the Fourteenth Amendment." There is no practical distinction between that case and this one.

* * * * * * *

The three-judge district court in *Klein v. Nassau County Medical Center, supra,* 347 F.Supp. at 500, gave the rationale underlying its decision that the equal protection clause prohibited New York State from providing medical assistance to indigent mothers who carried their pregnancies to term but not to those who choose to have nontherapeutic abortions in language which we find equally compelling in the circumstances of the instant case.

> The directive [prohibiting medical assistance to indigent women having nontherapeutic abortions] . . . den[ies] indigent women the equal protection of the laws to which they are constitutionally entitled. They alone are subjected to State coercion to bear children which they do not wish to bear, and no other women similarly situated are so coerced. Other women, able to afford the medical cost of either a justifiable abortional act or full term child birth, have complete freedom to make the choice in the light of the manifold of considerations directly relevant to the problem uninhibited by any State action. The indigent is advised by the State that the State will deny her medical assistance unless she resigns her freedom of choice and bears the child. She is denied the medical assistance that is in general her statutory entitlement, and that is otherwise extended to her even with respect to her pregnancy. She is thus discriminated against both by reason of her poverty and by reason of her behavioral choice.

We conclude that the city policy against all nontherapeutic abortions together with the staffing procedures at the OB-GYN clinic of the city hospital combine to deny Doe and her class the equal protection of the law.[7]

Remedy

We declare the city's policy prohibiting all nontherapeutic abortions in its publicly owned hospitals to be unconstitutional as an unwarranted infringement on pregnant women's right to privacy and as a denial of equal protection to indigent pregnant women. Likewise, we declare the method of staffing the obstetrics-gynecology clinic of the city hospitals to be an unconstitutional denial of equal protection to those indigent pregnant

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[7] The city urges as a defense that its policy and staffing were authorized by Mo. Rev. Stat. § 197.032 (Supp. 1975), which provides:

> No physician or surgeon, registered nurse, practical nurse, midwife or hospital, public or private, shall be required to treat or admit for treatment any woman for the purpose of abortion if such treatment or admission for treatment is contrary to the established policy of, or the moral, ethical or religious beliefs of, such physician, surgeon, registered nurse, midwife, practical nurse or hospital.

Doe does not attack this statute in the instant litigation. Nonetheless, there is no merit to the city's argument. The city's policies and acts must be judged against the federal Constitution in this action under 42 U.S.C. § 1983. The very purpose of section 1983 would be completely obliterated if local officials were to have their actions judged only in the light of state law and not under constitutional standards.

It may appear to follow logically from our holding in this case that the Missouri statute is unconstitutional. However, that question is not before us, and we do not decide it. We simply review the city's policy and procedures under established constitutional principles and find them lacking.

women who, in exercising their right to privacy, may choose to terminate the pregnancy under the guidelines laid down by *Roe v. Wade, supra,* and *Doe v. Bolton,* 410 U.S. 179 (1973). We hold that both city owned hospital facilities must be made available for abortion services as they are other medical procedures. *Nyberg v. City of Virginia, supra,* 495 F.2d at 1347.

We remand the cause to the district court for the fashioning of prompt and appropriate injunctive relief. In addition to enjoining enforcement of the city's antiabortion hospital policy, this relief should, at a minimum, impose upon the city the duty to obtain the services of responsible physicians and other necessary personnel whose personal views on abortion do not prohibit them from providing an abortion. It must also provide the necessary equipment and facilities to accomplish the goal. In short, the city will not be allowed to achive indirectly through its manner of staffing its hospitals what it cannot accomplish directly—the prohibition of all nontherapeutic abortions in those hospitals. As stated by the Supreme Court in the context of school desegregation:

> [C]onstitutional rights . . . not to be discriminated against . . . can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes . . . whether attempted "ingeniously or ingenuously."

Cooper v. Aaron, 358 U.S. 1, 17 (1958).

We stress, however, that the remedy is to be directed at the city officials acting as such and should order them to take certain official actions. It should not require that any present member of the staff of the public hospitals or any individual employee of the hospitals participate or assist in any way in the performance of abortions if, as a matter of conscience, he objects to so doing. *See Doe v. Hale Hospital,* 500 F.2d 144, 147 (1st Cir. 1974), *cert. denied,* 43 U.S.L.W. 3416 (U.S. Jan. 28, 1975); *Nyberg v. City of Virginia, supra,* 495 F.2d at 1347.

Attorneys' Fees

On appeal Doe asked that she be awarded attorneys' fees as costs. The traditional American rule ordinarily disfavors allowance of attorneys' fees to the prevailing party. It is clear, however, that the federal courts do have equitable power to award such fees when, in the interests of justice, the situation calls for them to do so. *Hall v. Cole,* 412 U.S. 1, 4-5 (1973); *Sprague v. Ticonic National Bank,* 307 U.S. 161, 166 (1939).

One such recognized exception to the rule is found where a party has acted as a "private attorney general" in vindicating an important public policy. *Hall v. Cole, supra,* 412 U.S. at 6 n.7; *Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400, 402 (1968); *Fowler v. Schwarzwalder,* 498 F.2d 143, 145-146 (8th Cir. 1974). We are convinced that this case falls within this exception. City authorities were acting in such a way as to deny a large number of women their constitutional right to privacy in making the abortion decision free from state interference or coercion, a right which had been clearly enunciated by the Supreme Court in *Roe v. Wade, supra,* 410 U.S. at 153, 164. Doe brought this action under 42 U.S.C. § 1983, a statute which evinces strong national policy in favor of protecting individuals' federal constitutional rights from abridgement by state authorities. In vindicating her constitutional right to privacy and equal protection in the abortion decision Doe thus enforced the important public policy of insuring that federal constitutional guarantees are not trampled upon under the guise of state or local law. *See Taylor v. Perini,* 503 F.2d 899, 905 (6th Cir. 1974); *Hoitt v. Vitek,* 495 F.2d 219, 221 (1st Cir. 1974); *Brandenburger v. Thompson,* 494 F.2d 885, 888-889 (9th Cir. 1974).[8]

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[8] Doe suggests that awarding attorneys' fees would be proper here under another exception to the rule—where a party has acted in bad

Accordingly, we award Doe attorneys' fees for the appellate portion of this litigation in the sum of $3,500 against the defendant Poelker.[9] On remand the district court is directed to determine attorneys' fees and to award them to Doe, together with court costs, against the defendant Poelker for that portion of this case carried on in that court. This should be a fair award based on the guidelines listed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974).

Conclusion

For the reasons discussed in this opinion the judgment of the district court is reversed and the case is remanded for the prompt fashioning of injunctive relief and for awarding attorneys' fees to the appellant Doe for services in the district court.

A True Copy.

Attest: /s/ ROBERT C. TUCKER

(Seal) Clerk, U.S. Court of Appeals, 8th Circuit.

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faith, vexatiously, wantonly or for oppressive reasons. *Hall v. Cole*, 412 U.S. 1, 5 (1973); *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 n.4 (1968); *Fowler v. Schwarzwalder*, 498 F.2d 143, 144 (8th Cir. 1974); *Bell v. School Board*, 321 F.2d 494, 500 (4th Cir. 1963). The long history of abortion litigation involving the State of Missouri and the City of St. Louis certainly suggests that these governments have delayed complying with the clear dictates of the Supreme Court and this Court to the maximum extent and have obstinately continued to implement and enforce statutes, regulations and policies designed to circumvent the constitutional law declared by the Supreme Court. *See Wulff v. Singleton*, 508 F.2d 1211 (8th Cir. 1974); *Doe v. Poelker*, 497 F.2d 1063 (8th Cir. 1974); *Word v. Poelker*, 495 F.2d 1349 (8th Cir. 1974). However, in light of our determination that attorneys' fees are to be awarded under the "private attorney general" theory, we need not and do not decide whether or not the actions of the city underlying this litigation and during the course of it call for application of this second exception.

[9] The evidence reveals that defendant Wochner was an appointee of the mayor and that he was simply carrying out his superior's orders in implementing the city policy. Therefore, we do not feel that attorneys' fees should be awarded against him.

United States Court of Appeals
for the Eighth Circuit
St. Louis, Mo. 63101

May 7, 1975

Robert C. Tucker, Clerk
Mr. Jack L. Koehr
City Counselor
Room 314, City Hall
1200 Market Street
St. Louis, Missouri 63103

Mr. Frank Susman
Susman, Schermer, Willer & Rimmel
7733 Forsyth Blvd., Suite 1100
St. Louis, Missouri 63105

Re: No. 75-1069. Doe v. Poelker.

Dear Sirs:

Enclosed herewith to each of you is copy of order entered by us today in the above case at the direction of the Court.

Very truly yours

/s/ ROBERT C. TUCKER
Clerk

eh

enc.

United States Court of Appeals
for the Eighth Circuit

No. 75-1069

Jane Doe, et al.,
Appellants,
v.
John H. Poelker, Mayor of the City of St. Louis, Missouri, and R. Dean Wochner, M.D., Director of the Department of Health and Hospitals and Acting Hospital Commissioner of the City of St. Louis, Missouri,
Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

ORDER

The petition for rehearing and suggestions for rehearing en banc is denied. This Court in response to the motion of the appellees for rehearing en banc, hereby modifies its memorandum opinion filed April 14, 1975, as follows:

1. Pages 11 and 14 are withdrawn and replaced by new pages 11 and 14, attached hereto and by reference made a part hereof.

Dated this 7th day of May, 1975.

A true copy.

Attest

Clerk, U.S. Court of Appeals,
Eighth Circuit

the city hospitals to be an unconstitutional denial of equal protection to those indigent pregnant women who, in exercising their right to privacy, may choose to terminate the pregnancy under the guidelines laid down by *Roe v. Wade, supra,* and *Doe v. Bolton,* 410 U.S. 179 (1973). We hold that both city owned hospital facilities must be made available for abortion services as they are for other medical procedures. *Nyberg v. City of Virginia, supra,* 495 F.2d at 1347.

We remand the cause to the district court for the fashioning of prompt and appropriate declaratory relief. In addition to declaring the necessity to change the city's anti-abortion hospital policy, this relief should, at a minimum, impose upon the city the duty to obtain the services of responsible physicians and other necessary personnel whose personal views on abortion do not prohibit them from providing an abortion. It must also provide the necessary equipment and facilities to accomplish the goal. In short, the city will not be allowed to achieve indirectly through its manner of staffing its hospitals what it cannot accomplish directly—the prohibition of all nontherapeutic abortions in those hospitals. As stated by the Supreme Court in the context of school desegregation:

> [C]onstitutional rights . . . not to be discriminated against . . . can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes . . . whether attempted "ingeniously or ingenuously."

Cooper v. Aaron, 358 U.S. 1, 17 (1958).

We stress, however, that the remedy is to be directed at the city officials acting as such and should declare the necessity

court is directed to determine attorneys' fees and to award them to Doe, together with court costs, against the defendant Poelker

for that portion of this case carried on in that court. This should be a fair award based on the guidelines listed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974).

Conclusion

For the reasons discussed in this opinion the judgment of the district court is reversed and the case is remanded for the prompt fashioning of declaratory[10] relief and for awarding attorneys' fees to the appellant Doe for services in the district court.

A true copy.

Attest

/s/ ROBERT C. TUCKER
Clerk
Court of Appeals
Eighth Circuit

(Seal)

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[10] There is no question but that injunctive relief rather than declaratory relief would be the proper remedy in this case. However, after requesting injunctive relief in her complaint, plaintiff later specifically withdrew that request. Under these circumstances we hesitate to invoke Fed. R. Civ. P. 54(c).

United States Court of Appeals
for the Eighth Circuit
St. Louis, Mo. 63101

June 2, 1975

Robert C. Tucker, Clerk
Mr. Jack L. Koehr
City Counselor
Room 314, City Hall
1200 Market Street
St. Louis, Missouri 63103

Mr. Frank Susman
Susman, Schermer, Willer & Rimmel
7733 Forsyth Blvd., Suite 1100
St. Louis, Missouri 63105

Re: No. 75-1069. Doe v. Poelker.

Dear Sirs:

Enclosed herewith to each of you is copy of order entered by us today in the above case at the direction of the Court.

Very truly yours

/s/ ROBERT C. TUCKER
Clerk

eh

enc.

United States Court of Appeals
For the Eighth Circuit

No. 75-1069

Jane Doe, et al.,
Appellants,
v.
John H. Poelker, Mayor of the City of St. Louis, Missouri, and R. Dean Wochner, M.D., Director of the Department of Health and Hospital and Acting Hospital Commissioner of the City of St. Louis, Missouri,
Appellees.

Appeal from the United States District Court for the Eastern District of Missouri

ORDER

(Filed June 2, 1975)

This Court, in response to the motion of the appellees to amend judgment by striking that portion of our opinion relating to attorneys' fees based upon the recent case of *Ayleska Pipeline Service Co. v. Wilderness Society*, 43 U.S.L.W. 4561 (U.S. May 12, 1975), herewith withdraws pages 12, 13 and 14 of the Court's opinion, as revised by our order of May 7, 1975, and substitutes therefor pages 12 to 20, inclusive, the original of which new pages are attached hereto and by reference made a part hereof.

Because of the change in substance of the attorneys' fee portion of the opinion made necessary by *Alyeska Pipeline*, the appellees are given an additional 14 days within which to file a second petition for rehearing or rehearing en banc. Such petition shall be limited solely to the changes made in the section of the opinion relating to attorneys' fees, after the ruling on which, the appellee may, if it so desires, renew its request for stay of mandate pending appeal.

Dated this 2nd day of June, 1975.

A true copy.

Attest: /s/ ROBERT C. TUCKER
Clerk, U. S. Court of Appeals, Eighth Circuit

(Seal)

to take certain official actions. It should not require that any present member of the staff of the public hospitals or any individual employee of the hospitals participate or assist in any way in the performance of abortions if, as a matter of conscience, he objects to so doing. *See Doe v. Hale Hospital*, 500 F.2d 144, 147 (1st Cir. 1974), *cert. denied*, 43 U.S.L.W. 3416 (U.S. Jan. 28, 1975); *Nyberg v. City of Virginia, supra*, 495 F.2d at 1347.

Attorneys' Fees

On appeal Doe asks that she be awarded attorneys' fees as costs. The traditional American rule ordinarily disfavors allowance of attorneys' fees to the prevailing party. It is clear, however, that the federal courts do have equitable power to award such fees when, in the interests of justice, the situation calls for them to do so. *Hall v. Cole*, 412 U.S. 1, 4-5 (1973); *Sprague v. Ticonic National Bank*, 307 U.S. 161, 166 (1939).

Prior to the recent Supreme Court decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 43 U.S.L.W. 4561 (U.S. May 12, 1975), we had believed that one recognized exception to the American rule was where a party acted as a "private attorney general" in vindicating an important public policy. *See Fowler v. Schwarzwalder*, 498 F.2d 143, 145-146 (8th Cir. 1974). However, the *Alyeska Pipeline* opinion has now conclusively established that the "private attorney general" exception exists only where provided by specific congressional act. *Alyeska Pipeline Service Co. v. Wilderness Society, supra*, 43 U.S.L.W. at 4570. Therefore, attorneys' fees may not be awarded under this theory in the instant case.

Nonetheless, we are convinced that an award of attorneys' fees to Doe is proper here under another exception to the rule which was spcifically recognized and reiterated in *Alyeska Pipeline*—"when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Id.* at 4567 (*quoting F. D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116, 129 (1974)). *See, e.g., Fowler v. Schwarzwalder, supra*, 498 F.2d at 144 (dictum); *Bell v. School Board*, 321 F.2d 494, 500 (4th Cir. 1963).

The long history of abortion litigation involving the State of Missouri and the City of St. Louis certainly suggests that these governments have delayed complying with the clear dictates of the Supreme Court and this Court relating to abortion to the maximum extent and have obstinately continued to implement and enforce statutes, regulations and policies designed to circumvent the constitutional law declared by the Supreme Court. *See Wulff v. Singleton, supra; Doe v. Poelker, supra; Word v. Poelker*, 495 F.2d 1349 (8th Cir. 1974). More specifically, the history of this particular litigation reveals a wanton, callous disregard for the constitutional rights of indigent pregnant women continuing long after those rights had been clearly enunciated by the Supreme Court in *Roe v. Wade, supra*, and *Doe v. Bolton, supra*.

Mayor Poelker took office in the Spring of 1973, after *Roe* and *Doe* were decided in January of that year. Nonetheless, he deliberately ordered that the city's anti-abortion policy be kept in effect because "[a]t the early stages there was . . . some contest to the decision as it applied [in Missouri]" and because of his "own personal conviction that abortion is murder." This implementation of his own personal moral pre-

cepts was done in spite of the recommendation of Dr. Wochner "that abortions should be provided under circumstances broader than that defined by the phrase, 'When the mother's life is in jeopardy.' "

When Doe finally challenged the policy by filing the instant complaint the city,[8] as soon as it learned that her pregnancy

[8] An indication of the intransigent attitude of the Mayor of the City of St. Louis toward the subject of abortion, and his complete rejection of the mandates of the Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973), is found in his answer to the complaint, some portions of which are set forth as follows:

> Abortion, for reasons other than to save the mother from grave physiological injury or death, is against and contrary to the laws and public policy of the State and City.
>
> Abortion, for reasons other than to safeguard the mother from grave physiological bodily injury or death, has never been within those medical services rendered by the hospitals of the City of St. Louis and has been both illegal (as aforesaid) and outside of, contrary to and prohibited by medical policies and judgment of the medical authorities of such hospitals.
>
> The City and its inhabitants, acting through duly empowered representatives, has the right to make reasonable determinations as to what medical services shall be supplied in the public hospitals of such City; and abortion, other than to protect the mother from grave physiological injury or death, is a medical procedure which lawfully can and has been reasonably excluded from such services given by the City's hospitals.
>
> . . . . . .
>
> All qualified natural persons have an inalienable natural right to participate in the institution of marriage, which no government has any lawful right to deny or substantially interfere with.
>
> . . . . . .

had been terminated, sought to have that complaint dismissed for lack of standing even though, as this Court pointed out on appeal from the resulting dismissal, the "conclusion that Doe has standing is mandated by the resolution of the identical issue

in Roe v. Wade, *supra*, 410 U.S. at 124, and Doe v. Bolton, *supra*, 410 U.S. at 187." *Doe v. Poelker*, *supra*, 497 F.2d at

> The people of the United States, and particularly the people of the State of Missouri, have a natural right, and a United States Constitutional right to have the Government of the United States, including its judiciary, protect, conserve and guard the institution of marriage in its essential character aforesaid, and to not disturb, negate and destroy such institution by purporting to grant to a female within such institution a unilateral, unconditional right to decide whether to bear children resulting from such marriage, and to carry out through abortion her negative decision.
>
> For the Government of the United States to purport to grant such right to such a female as aforesaid, including plaintiff, is a fundamental violation of the natural rights of the people of the United States and particularly the people of the State of Missouri, and for the Constitution of the United States by asserting powers prohibited by Article IX of the Amendments of said Constitution and not delegated but reserved by the people according to Article X of the Constitution.
>
> . . . . . .
>
> For the United States Government to so alter the institution of marriage in its essential nature and character would be a purported amendment of the Constitution of the United States by a method or way unauthorized by said Constitution and particularly Article V, thereof, in violation of said Ninth and Tenth Amendments of the United States Constitution and a violation of the distributive individual rights of the people of Missouri, and person, particularly the husband in each marriage existent of the State of Missouri, to due process of law under the Fifth and Fourteenth Amendments of the United States Constitution.
>
> — 15 —

1066. (Poelker did not attempt to appeal this decision.) In short, well over a year after *Roe* and *Doe* were decided the city was still arguing that a pregnant woman lost her standing to challenge abortion laws once her pregnancy terminated, in spite of the clear dictates of the Supreme Court to the contrary. This, of course, was an effective tactic to delay a decision on the merits; but we believe the record is clear that it was pursued for an oppressive reason—to keep indigent pregnant women from exercising their constitutional rights in the abortion decision for the maximum period of time.

We simply cannot close our eyes to a course of conduct in policy-making and litigating which, at the very least, reflects a wanton disregard for the constitutional rights of the plaintiff and other indigent pregnant women in St. Louis. Neither can we ignore the fact that the unconstitutional city policy was designed by Mayor Poelker to operate against a class of individuals whose economic status was such as to leave them relatively defenseless against this violation of their rights. The city has been obdurate and obstinate in compelling these women to conform to the mayor's personal moral beliefs on the abortion issue. The fact that no abortions have been performed in the city's hospitals since the *Roe* and *Doe* decisions attests to the effective and oppressive nature of the mayor's policy and the defense of it in the courts.

Accordingly, we award Doe attorneys' fees for the appellate portion of this litigation in the sum of $3,500 against the defendant Poelker.[9] On remand the district court is directed to

[9] The evidence reveals that defendant Wochner was an appointee of the mayor and that he was simply carrying out his superior's orders in implementing the city policy. Therefore, we do not feel that attorneys' fees should be awarded against him.

determine attorneys' fees and to award them to Doe, together with court costs, against the defendant Poelker for that portion of this case carried on in that court. This should be a fair award based on the guidelines listed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974).

Conclusion

For the reasons discussed in this opinion the judgment of the district court is reversed and the case is remanded for the

prompt fashioning of the declaratory[10] relief and for awarding attorneys' fees to the appellant Doe for services in the district court.

VAN OOSTERHOUT, Senior Circuit Judge, concurring in part and dissenting in part.

The effect of the amended opinion of the majority is to vacate the award of attorneys' fees under the private attorney general exception to the prevailing American rule disallowing attorneys' fees to the successful party and the granting of attorneys' fees under the bad faith exception to the general rule. I agree with the majority that the vacation of our prior allowance

[10] There is no question but that injunctive relief rather than declaratory relief would be the proper remedy in this case. However, after requesting injunctive relief in her complaint, plaintiff later specifically withdrew that request. Under these circumstances we hesitate to invoke Fed. R. Civ. P. 54(c).

of attorneys' fees on appeal under the private attorney general exception is required by *Alyeska Pipe Line Service Co. v. Wilderness Society*, — U.S. — (43 U.S.L.W. 4561, May 12, 1975). I dissent from the award of attorneys' fees on appeal and the remand to the district court with direction to award attorneys' fees for services in the district court on the basis that the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons. My dissent is based on several grounds.

I

The plaintiffs have not met the burden resting upon them to demonstrate that they properly raised the issue of their right to attorneys' fees on the basis of the bad faith exception to the general rule. It is well-settled law that issues not raised in the

trial court or upon appeal cannot be considered by an appellate court as a basis for reversal. *See Smith v. American Guild of Variety Artists*, 368 F.2d 511, 514-515 (8th Cir. 1966), and cases there cited. Plaintiffs in their brief upon appeal state: "Appellants respectfully request that pursuant to the jurisdictional grounds of their 'Complaint', specifically set forth in paragraph 1 of same, this Honorable Court award to appellants a reasonable attorneys' fees." Paragraph 1 of the complaint merely sets out the jurisdictional basis for the action and makes no claim either in that paragraph or in the prayer for attorneys' fees. Plaintiffs in brief argue that they are entitled to attorneys' fees under the private attorney general exception to the general rule. No mention is made of the bad faith exception claim.

It is unfair to the trial court and the litigants to allow the recovery of attorneys' fees on the basis of an issue not raised in the trial court or properly raised upon appeal. Under such

circumstances, the litigants are not afforded a fair opportunity to meet the issue by evidence or briefs. Upon the original submission of the appeal the bad faith issue was not briefed.

II

No fact finding on the bad faith issue was made by the trial court. No request for a Rule 52(b) amendment for a finding upon the issue was made.

Under Rule 52(a), in cases tried to the court the trial court is the appropriate fact finder. The trial court's findings can be set aside only if clearly erroneous. We have no right to try cases de novo. Thus if contrary to what has heretofore been said, the bad faith exception is properly before us, the case should be remanded to the trial court for determination of such issue.

III

The discretion for awarding attorneys' fees under appropriate circumstances, absent statute or contract providing for such fees, rests in the trial court subject to review for abuse of discretion. We cannot substitute our discretion for that of the trial court.

IV

Alyeska recognizes that upon a proper record attorneys' fees can be granted in the court's discretion for willful disobedience of a court order or bad faith. The Supreme Court in that case rejected the attorneys' fees award granted on the basis of private attorney general exception but did not proceed to determine

whether such relief could be granted under another exception to the general rule nor did it remand the case for such determination.

Since I am of the view that the resolution of the attorneys' fees on the bad faith issue is not properly before us, I express no view on the merits of such contention. I dissent from the award of attorneys' fees on appeal and the remand to the district court for mandatory determination of attorneys' fees in that court.

A true copy.

Attest:

/s/ ROBERT C. TUCKER
Clerk
U. S. Court of Appeals,
Eighth Circuit

(Seal)

United States Court of Appeals
For the Eighth Circuit

No. 75-1069 September Term, 1974

Jane Doe, et al.,
Appellants,
vs.
John H. Poelker, etc., et al.,
Appellees.

Appeal from the United States District Court for the Eastern District of Missouri

(Filed June 24, 1975)

The Court having considered second petition for rehearing en banc filed by counsel for appellees and, being fully advised in the premises, it is ordered that the second petition for rehearing en banc be, and it is hereby, denied.

Considering the second petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

June 24, 1975

A True Copy.

Attest:

ROBERT C. TUCKER
Clerk
U.S. Court of Appeals
8th Circuit

(Seal)

In the United States District Court
Eastern District of Missouri
Eastern Division

Jane Doe, et al.,
Plaintiffs,
vs.
John H. Poelker, Mayor of the City of St. Louis, Missouri, et al.,
Defendants.

No. 73C 565(A)

ORDER

(Filed August 8, 1975)

Pursuant to the opinion filed April 14, 1975, as modified on May 7, 1975, and June 2, 1975, and the mandate of the United States Court of Appeals for the Eighth Circuit, issued on July 8, 1975,

It Is Hereby Ordered, Adjudged and Decreed as Follows:

1. The policy of defendants prohibiting all nontherapeutic abortions in the general, public hospitals of the City of St. Louis, Missouri, are hereby declared to be unconstitutional.

2. It is further declared that the defendants, in their official capacities, have the duty to take whatever actions may be reasonably necessary to effect a change in the policy and procedures prohibiting all nontherapuetic abortions in the general, public hospitals of the City of St. Louis.

/s/ ROY W. HARPER
U. S. District Judge

In the United States District Court
Eastern District of Missouri
Eastern Division

Jane Doe, et al.,
Plaintiffs,
vs.
John H. Poelker, Mayor of the City of St. Louis, Missouri, et al.,
Defendants.
No. 73C 565(A)

MEMORANDUM AND ORDER

(Filed August 8, 1975)

This case is before the Court for the prompt fashioning of declaratory relief and for awarding attorneys' fees to attorneys for the appellant Doe for services in said District Court in accordance with the mandate of the Eighth Circuit Court of Appeals.

With respect to the awarding of attorneys' fees, the Eighth Circuit Court of Appeals at pages 16-17 of its slip opinion said: "On remand the District Court is directed to determine attorneys' fees and to award them to Doe, together with court costs, against the defendant Poelker for that portion of this case carried on in that court. This should be a fair award based on the guidelines listed in *Johnson v. Georgia Highway Express, Inc.*, 488 F. 2d 714, 717-719 (5th Cir. 1974)."

Upon receipt of the mandate from the Eighth Circuit Court of Appeals a hearing was set, and at the hearing testimony was introduced with respect to the attorneys' fees. Frank Susman, an attorney for the plaintiffs, testified that he had personally

spent 144 hours working on the case, at a reasonable value of $60.00 an hour; that two of his associates, Newman and Komen, had worked on the case; that Newman had worked 10½ hours in 1973 and that the value of such services was $35.00 an hour; that Newman had worked 44.4 hours in 1974 and that the reasonable value of said services was $45.00 an hour; that Komen had worked 5.6 hours on the case in 1974, and that the value of such services was $45.00; and that the total fee which had been requested was $11,257.50.

Mr. Susman further testified with respect to a letter (Exhibit A), in which he had stated that Jane Doe, the plaintiff, had no obligation to pay any costs or attorneys' fees in said case. He further testified that in the initial discussion with respect to the case that he, the plaintiff, Joyce Armstrong, the Executive Secretary of American Civil Liberties Union, and associate Newman, had discussed the possibility of bringing the case, and that Jane Doe, the plaintiff, was advised that she would not be responsible for any attorneys' fees or costs, and that there was no agreement with Jane Doe at that time to turn over anything to ACLU. He further testified that he would not receive any fee for the handling of the case, and that any fee allowed would be turned over in full to ACLU, according to their policy. He did not include in his petition any request for an attorney's fee, and no proof was put on before the Court in the trial of the case with respect to attorneys' fees.

He further stated that he is a dues-paying member of the American Civil Liberties Union of Eastern Missouri, and that the petition is signed by him, below which is typed: "FRANK SUSMAN, of the American Civil Liberties Union of Eastern Missouri, Attorney for Plaintiff."

Mr. Susman further testified that some six months ago he had talked with Jane Doe and there was some discussion of fees, and where they would go, and it was clearly understood

they would go to ACLU. He further testified that he made no distinction with respect to charges per hour for his work between legal work and investigative work.

Courtney Shands, an attorney, testified that the legal rates referred to were reasonable in the St. Louis area.

Ben Usetel testified that the $60.00 per hour for Mr. Susman was reasonable, but that in his office, the associates' rates were $40.00 rather than $45.00 per hour.

Jane Doe testified that she had not in writing agreed to turn over any attorneys' fees to ACLU, nor does she recall any such oral agreement. She further testified she was not aware of any attorneys' fees to be allowed to her, and that this was the first she knew of it.

The record in this case discloses that the actual time spent in court in the trial of this case on the day it was set was approximately two hours and forty-five minutes, and that while the court had conferences with the attorneys, the motions for the most part were submitted on briefs without oral argument.

Under the guidelines set out in *Johnson v. Georgia Highway Express, Inc.*, supra, considering the length of time spent in the trial of the case, considering the policy of the attorneys with respect to charging for legal and investigative work, in the court's opinion the sum of $9,317.50 is a reasonable fee for the services in this case, if a fee is to be allowed. The Court of Appeals, as above set out, directed that the attorneys' fees should be based on the guidelines listed in *Johnson*, supra, pages 717-719. At page 718, the Court had this to say:

> "* * * In no event, however, should the litigant be awarded a fee greater than he is contractually bound to pay * * *."

In view of the mandate of the Eighth Circuit Court of Appeals directing that the attorneys' fee be based on the guidelines listed in the *Johnson* case, and in view of the fact that the above quote is a part of those guidelines, no attorneys' fee is allowed to the plaintiff, Jane Doe, in this case.

/s/ ROY W. HARPER
U. S. District Judge

In the United States District Court
For the Eastern District of Missouri
Eastern Division

Jane Doe, *et al.*,
Plaintiffs,

vs.

John H. Poelker, Mayor of the City of St. Louis, Missouri, *et al.*,
Defendants.

Cause No. 73C565A

NOTICE OF APPEAL

(Filed August 14, 1975)

Notice is hereby given that plaintiffs, Jane Doe and the class she represents, hereby appeal to the United States Court of Appeals for the Eighth Circuit from an "Order" and "Memorandum and Order," entered on August 8, 1975, failing to award the reasonable amount of attorneys' fees, determined by the District Court to be Nine Thousand Three Hundred Seventeen and 50/100 Dollars ($9,317.50), and failing to assess Court costs against defendant Poelker.

SUSMAN, SCHERMER, WILLER
& RIMMEL
/s/ FRANK SUSMAN
7733 Forsyth Boulevard—Suite 1100
St. Louis, Missouri 63105
(314) 725-7300
Attorneys for Plaintiffs

United States District Court
Eastern District of Missouri
Office of the Clerk
Saint Louis, Missouri 63101

William D. Rund, Clerk
Jack L. Koehr
City Counselor
Rm. 314, City Hall
1200 Market St.
St. Louis, Missouri 63103

Re: Case No. 73C 565 (A)
Jane Doe vs. John H. Poelker, et al.

Enclosed herewith is a copy of a Notice of Appeal filed in the above case together with a copy of the Clerk's docket entries.

You are also advised that all parties and counsel are expected to comply strictly with all rules applicable to the appellate process prescribed by the the Federal Rules of Appellate Procedure, the Rules of the United States Court of Appeals for the Eighth Circuit and to follow the procedural steps set out in the handbook of Practice and Procedure in the United States Court of Appeals for the Eighth Circuit.

Very truly yours,

WILLIAM D. RUND, Clerk
By /s/ JAMES R. VILLANI
Deputy Clerk

Enclosures

cc: Official Court Reporter

United States Court of Appeals
For the Eighth Circuit
St. Louis, Mo. 63101

Robert C. Tucker, Clerk

August 22, 1975

Mr. Frank Susman
7733 Forsyth Blvd., Suite 1100
St. Louis, Missouri 63105

Mr. Eugene P. Freeman
Deputy City Counselor
Room 314 City Hall
1200 Market Street
St. Louis, Missouri 63103

Re: 75-1648. Jane Doe, et al. v.
Mayor Poelker, et al.

Dear Sirs:

Enclosed herewith to each of you please find copy of an order entered by us today at the direction of the court.

Briefs called for in the order today may be typewritten and Xeroxed on letter-size paper, fastened in the left margin. I will need an original and four copies and additional copies should, of course, be served on opposing counsel.

It is my intention to set this case down for submission to a panel of judges at the session to be held the week of October 13, 1975, in St. Paul, Minnesota.

Very truly yours,

ROBERT C. TUCKER
Clerk

a
Enc.

copy
Mr. William D. Rund, Clerk
United States District Court
St. Louis, Missouri
Appeals Expediter

United States Court of Appeals
For the Eighth Circuit

75-1648 September Term, 1974

Jane Doe, et al.,
Appellants,
vs.
John H. Poelker, Mayor of the City of St. Louis, Missouri, et al.,
Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

For cause shown it is now here ordered:

1) Counsel for the parties to this appeal may omit preparation of appendix. The court will consider the appeal on a designated record pursuant to local rule 11. Counsel for appellants may have to and including September 2, 1975, in which to file opening rule 11 designation with the clerk of the United States District Court for the Eastern District of Missouri in case No. 73-C-565(A).

2) It is further ordered that appellants may have to and including September 12, 1975, in which to serve and file opening briefs and appellees may have to and including October 3, 1975, in which to serve and file answer briefs.

August 22, 1975

CHARTER

of the

CITY OF SAINT LOUIS, MISSOURI

Adopted by the Vote of the People, June 30, 1914

In Effect From

AUGUST 29, 1914

As Amended Pursuant to Ordinances

33644—35368—39898—42021—42060—43505
43548—44822—47117—49101—49502—49540
49821 and 50165

CONTENTS

Charter

Article		Page
I	Incorporation	1
II	Elections	14
III	Recall of Elective Officers	15
IV	Board of Aldermen	17
V	Initiative	22
VI	Referendum	24
VII	Mayor	26
VIII	City Officers and Employees	28
IX	Register	31
X	Law Department	31
XI	City Marshal	32

Article		Page
XII	City Courts	32
XIII	Board of Public Service	33
XIV	Art Museum and Zoological Park	43
XV	Department of Finance	43
XVI	Board of Estimate and Apportionment	50
XVII	City Bonds	51
XVIII	Civil Service	54
XIX	Franchises	73
XX	License Taxes	75
XXI	Eminent Domain	75
XXII	Public Works and Improvements	86
XXIII	Special Tax Bills	94
XXIV	Improvement Bonds and Funds	97
XXV	Miscellaneous Provisions	99
	Schedule (Transitional Provisions)	101

Scheme

Chapter		Page
Scheme		105

Article XVIII. Civil Service[4]

Section 1. Definitions.—The terms defined in this section, when used in this article, have the following meanings except where the context clearly requires otherwise:

(*a*) "*Appointing authority*" means any person or group of persons having power by law or ordinance, or by lawfully delegated authority, to make appointments to any position in the city service.

(*b*) "*City service*" or "*service of the city*" means all positions as herein defined, that are subject to control and regulation by the City of St. Louis as a municipal corporation or any of its officers or other agencies as such.

(*c*) "*Class*" or "*class of positions*" means a definitely recognized kind of employment in the classified service designed to embrace all positions sufficiently alike to be treated alike.

(*d*) "*Classified service*" means all positions in the city service except those specifically placed in the unclassified service as herein defined.

(*e*) "*Compensation*" means the salary, wages, fees, allowances and all other forms of valuable consideration, earned by or paid to any employe by reason of service in any position, but does not include any allowance for expenses authorized and incurred as incidents to employment.

(*f*) "*Competitive position*" means any position in the classified service not expressly designated as an excepted position in this section.

(*g*) "*Examination*" means all the tests of fitness, taken together, that are applied to determine the fitness of applicants for positions of any class.

---

[4] *Editor's note.*—This article is an amendment to the charter which was adopted pursuant to Ordinance 42021.

(*h*) *"Excepted position"* means any position in the classified service not subject to the provisions of this article requiring competitive tests of fitness for appointment and such other provisions as, by their terms, apply specifically to competitive positions alone. All such positions, however, shall be subject to all the other provisions of this article insofar as consistent with law and with this exception. The following described positions, and no others, shall be deemed to be excepted positions:

(1) all positions filled by election of the people;

(2) all positions of heads of principal departments and of independent agencies, that are filled by appointment by the mayor;

(3) one position of executive secretary and one position of secretary and stenographer to the mayor;

(4) all positions of paid members of boards;

(5) all officers and employees of the board of aldermen.

(*i*) *"Employe"* means a person legally occupying a position.

(*j*) *"Grade"* means all positions or classes of positions in the city service that are determined to be of the same level with respect to the difficulty and responsibility of their duties and any other measure of value, and for which the same rate or scale of rates of compensation is prescribed, under the provisions of this article.

(*k*) *"Position"* means any appointive or elective office, and any employment, or two or more of such offices and employments the duties of which call for services to be rendered by one person.

(*l*) *"Test of fitness"* means any means or measure for determining the merit and fitness of persons for original appointment or promotion to positions of a class; and

(*m*) *"Unclassified service"* means all positions not subject to the provisions of the charter, ordinances and civil service rules relating exclusively to positions in the classified service, and includes positions, as follows, and no others:

(1) all positions of members of boards, commissions or committees serving without compensation;

(2) all other positions in which services are rendered without compensation;

(3) all officers and employes of the board of aldermen.

Sec. 2. *Purpose and basic requirements of article.*—It is the purpose of this article to provide a modern and comprehensive system of personnel administration for city, whereby economy and effectiveness in the personal services rendered to the city, and fairness and equity to the employes and the taxpayers of the city, alike, may be promoted. To accomplish this end the provisions of this article shall be liberally construed.

The following principles and policies shall be observed, as basic requirements:

(a) *Merit and fitness.*—All appointments and promotions to positions in the service of the city and all measures for the control and regulation of employment in such positions, and separation therefrom, shall be on the sole basis of merit and fitness, which so far as practicable, shall be ascertained by means of competitive tests, or service ratings, or both.

(b) *Rates of pay.*—Fair and equitable rates of pay shall be provided with the consideration of both the employes and the taxpayers and with due observance of the principle of like pay for like work, and suitable differences in pay for differences in work.

(c) *Employes' interests.*—Consideration shall be given to the desires and interests of the employes insofar as consistent

with the best interests of the city as an employer, and of the public served.

(d) *Nature of city service.*—The city service, so far as practicable, shall be made attractive as a career, and each employe shall be encouraged to render his best service in willing compliance with the provisions of this article.

Sec. 3. *Scope of civil service rules.*—To give effect to the purpose and requirements set forth in the next preceding section, the civil services rules hereinafter required to be adopted shall provide for the following things, among others, with relation to the classified service as defined herein:

(a) *Classification plan.*—For a systematic classification plan providing for the classification of all positions on the basis of their duties, responsibilities and resulting qualification requirements; for definitions of the classes in the classification plan; for the allocation of all positions to their appropriate classes in the classification plan; and, for the amendment and continuous administration of the classification plan. No person shall be employed or paid in any position until the class of such position has been determined by allocation of the position by the director to its appropriate class.

(b) *Compensation plan.*—For development and recommendation to the mayor and aldermen of a systematic compensation plan, and amendments thereto from time to time as deemed necessary, to provide for uniform scales of compensation for all positions of the several classes, by grades, with due relationships among scales of compensation of the several grades, and for the continuous administration of such compensation plan as is adopted by ordinance.

(c) *Competitive examinations.*—For determining merit and fitness for appointment and promotion to competitive positions by means of competitive examinations held after due public

notice. The tests of fitness in such examination shall be practical in character and designed fairly to measure the relative qualifications of candidates for positions of the several classes.

(d) *Certification and appointment of eligibles.*—For certification of eligibles and for appointment and promotion to competitive positions on the basis of such tests, subject to a working test period of probation not to exceed one year. One of the highest three (3) eligibles certified or remaining on the list of eligibles certified to be appointed to each vacancy.

(e) *Filling vacancies; promotions.*—For filling vacancies in higher competitive positions, so far as practicable, by means of promotion on competitive examination except where vacancies are filled, in the interests of the service, by demotion, transfer, reinstatement or re-employment, in the order of preference here indicated, where applicable. Promotion on competitive examination shall be deemed to be practicable whenever there are qualified employes in positions of lower classes who are willing to compete.

(f) *Tenure of employment.*—For indefinite tenure of employment in positions in the classified service during meritorious service, except in cases for which indefinite terms are prescribed by law or charter, and except in cases of temporary appointment hereunder, but with due provision for layoff on termination of the need for employment in any position or of funds available therefor.

(g) *Temporary appointments.*—For temporary appointments, without competitive tests, to competitive positions, for not to exceed sixty days in any case, which shall not be renewed or extended. Such temporary appointments to be provided for shall include provisional appointments in the absence of available eligibles pending establishment of eligible registers and certification and appointment therefrom, transient appointments for

short jobs of work, and emergency appointments pending filling of vacancies by other means than such emergency appointments.

(h) *Service standards and ratings.*—For the establishment of standards of service and a system of service ratings. The service ratings provided shall be given consideration in examinations for promotions, and in connection with increases in pay, layoffs, reemployments, transfers, reinstatements, reductions in pay, demotions and removals hereunder. Standards of service shall be established which any employe must meet to qualify for an increase in pay, reinstatement, re-employment or promotion, and other standards shall be established, failure to meet which shall result in action for decrease in pay, demotion or removal.

(i) *Welfare programs.*—For cooperation by the director with appointing authorities in promoting programs of employe welfare, including such training, health, recreation, economic and other programs as may be deemed desirable.

(j) *Transfers.*—For transfers between competitive positions of the same grade for which no additional or different tests of fitness are required, in the same or different departments, for the benefit of the service directly, or indirectly for such benefit by promotion of satisfaction of the employes, or by elimination of supernumerary positions.

(k) *Reinstatement.*—For reinstatement to and re-employment in competitive positions after layoff, and after other separation without delinquency or misconduct, where the interests of the service will be served thereby.

(l) *Hours of duty, holidays and leaves.*—For recommendations by the commission to the mayor and aldermen, regarding ordinance provisions to regulate the hours of duty, holidays and leaves of absence, and for administration of any such ordinances

adopted. Such ordinance provisions as are adopted shall be administered and carried into effect by the department of personnel herein provided for. The minimum daily, weekly and annual service required under regular full-time employment shall be fixed by ordinance with due relation to the requirements in private employment in the city and with a view to equity as between positions of different classes and those under different appointing authorities. The requirements may vary for different classes or conditions of employment but shall be uniform in their application to employes of the same classes under like conditions of work. The ordinance provisions shall be enforced by effective control of attendance and absence and audit of pay rolls with reference thereto. Each employe in the classified service shall be required to engage in the actual work of the office or employment held to such extent as his services may be required for the complete discharge of the duties of such office or employment and a failure so to do shall be ground for removal.

(m) *Part-time services.*—For payment for part-time services on an equitable basis in relation to the hour employed as compared with the requirements for full-time service. Where less than full-time service is required or rendered in any position, compensation for such service shall be paid on the part-time basis established by such rules.

(n) *Removals and demotions.*—For removals, demotions and decreases in pay in the cases of employes whose service rendered is below satisfactory standards, designed to promote the efficiency of the service. Such action shall be effective only after written notice to, with right of appeal in, the employes affected, and after such investigation as is appropriate to insure that the action taken is on the sole ground of merit and fitness.

(o) *Fines and suspensions.*—For fines, and for suspensions without pay for not to exceed thirty days, and for other dis-

ciplinary measures deemed desirable, of less severity than those set forth in the item next preceding.

(p) *Resignations.*—For resignations in good standing, for investigation of reported resignations to determine their good faith, for records of the causes of resignations, and for initiating action to remove causes leading to excessive numbers of resignations of capable employes.

(q) *Roster of employes.*—For maintenance of a complete official roster of employes showing for each employe, his name, address, class title, rate of pay, and changes in any of them, and such other information as may be deemed desirable.

(r) *Retirement system.*—For recommendation if and when permissible under the constitution and laws of the state of Missouri, to the mayor and aldermen by the civil service commission of a suitable system for the retirement of employes who, by reason of injury, ill health or age, have become incapacitated for rendering satisfactory service, and for administration by the department of personnel of such retirement system as may be adopted by ordinance.

(s) *Reports by appointing officers.*—For reports by appointing officers of new positions and changes in the positions authorized and in the employments therein, and of attendance and absence, which upon approval by the director shall form basis for audit and approval of pay rolls by the comptroller as to compliance with this article and the rules and ordinances thereunder.

(t) *Audit of pay rolls.*—For audit of pay rolls by the comptroller as a condition precedent to payment by the treasurer or any other disbursing officer of any claim or account for personal services. The comptroller shall not approve any item of a pay roll or account for payment of any employe, or issue his warrant for any payment therefor, except on evidence satisfactory to him

that the person named has been lawfully employed in a position duly authorized and is entitled to payment for actual service in such position or authorized absences therefrom at the rates, for the periods and in the amounts, covered by such pay roll or account.

(u) *List of nonessential positions.*—For the listing of positions deemed nonessential for effective administration of the city's affairs, and for seeing that, as occasion arises, steps be taken toward transfer of the employes therein to any other vacant positions to which they are eligible to be transferred under the provisions of this article, and for prevention of filling of any vacancy occurring therein.

(v) *Administration.*—For the administration and enforcement of the provisions of this article and all provisions of ordinances and rules adopted in pursuance thereof, by the director, subject to the rules of the commission and subject to appeal to and review on appeal by the commission.

(w) *Examination fees.*—Such rules may provide for the charging and collection of reasonable fees from applicants for examinations as prerequisites to the acceptance of their applications, and in such amounts as are calcuated to pay part or all of the cost of preparing and holding the examinations and rating the results thereof.

Sec. 4. *Ordinances to be enacted.*—The mayor and aldermen shall provide, by ordinance:

(a) *Compensation plan.*—For adoption of a comprehensive compensation plan for the fixing of rates of pay of all employes in the classified service, and amendments thereto on recommendation of the civil service commission, and for its application and interpretation. Every appropriation and expenditure for personal services in any position in the classified service there-

after shall be made in accordance with the compensation plan so adopted and not otherwise.

(b) *Retirement system.*—For a contributory retirement system on a sound actuarial basis, if and when permissible under the constitution and laws of the State of Missouri, to provide for retirement of employes in the classified service who have become unable to render satisfactory service by reason of physical or mental incapacity.

(c) *Hours of duty and holidays.*—For regulating hours of duty, holidays, attendance and absence, in the classified service.

(d) *Appropriations for department of personnel.*—For appropriations for the purposes of the department of personnel, adequate to provide for the effective administration and enforcement of the provisions of this article and the rules and ordinances adopted thereunder. In each fiscal year, such appropriations shall aggregate not less than one-half of one percent of the amount of all expenditures for personal services in the city service in the fiscal year next preceding, and in default of such minimum appropriations or any part thereof, such minimum appropriations or any deficiency therein, nevertheless shall be deemed to have been made.

Sec. 5. *Department of personnel.*—There is hereby created a department of personnel of the government of the city which shall consist of a director of personnel as head thereof, a civil service commission and such other employes as may be needed.

Sec. 6. *Civil service commission—Composition.*—(a) *Qualifications, appointment and term of members.*—The civil service commission shall consist of three members who, on the dates of their appointment, shall have been citizens of the United States and residents of the City of St. Louis for at least two years next preceding. They shall be persons whose past records indicate that they favor the merit system of personnel administration.

No person shall be eligible to appointment as a member of the civil service commission who holds any other salaried public office or who has held any elective public office or elective position in any political party, or any paid position in any political party, within the four years next preceding the date of his appointment. Members shall be appointed by the mayor without regard to any political consideration. Within thirty days after the adoption of this section, the mayor shall appoint the first civil service commission, designating one member to serve for a term of two years, a second member for a term of four years and the third member for a term of six years from the first day of July, next preceding. All subsequent appointments of members of the commission shall be for six years, except that any vacancy in the membership of the commission occurring at a time other than the expiration of a term shall be filled by the appointment of a member to serve for the unexpired portion of the term.

(b) *Removal of members.*—The mayor may remove a member of the commission only upon charges of nonfeasance, malfeasance or misfeasance in office and after a public hearing to be held not less than ten days after notice to the members so charged, accompanied by a statement in writing of the specific acts charged. At the hearing, the member may be represented by an attorney and shall be entitled to present witnesses in his defense.

(c) *Compensation.*—Each member of the commission shall be paid fifteen dollars for each day on which he has actually attended a meeting of the commission officially held, as a member thereof, but in no case shall any member be paid more than sixteen hundred and eighty dollars in any one fiscal year.

Sec. 7. *Commission powers and duties.*—The commission shall have power, and it shall be its duty:

(a) *Administration.*—To describe, and to amend from time to time as such action is deemed to be desirable, rules for the administration and enforcement of the provisions of this article, and of any ordinance adopted in pursuance thereof, and not inconsistent therewith.

(b) *Ordinances.*—To recommend to the mayor and aldermen in accordance with this article, ordinances to provide for:

(1) a compensation plan providing properly related scales of pay for all grades of positions and rules for its interpretation and application;

(2) a plan for a system for retirement of superannuated and otherwise incapacitated employes, if any when permissible under the constitution and laws of the State of Missouri;

(3) regulation of hours of duty, holidays, attendance and absence;

(4) such other matters within the scope of this article as require action by the mayor and aldermen;

(5) such changes in any such matters from time to time as may be deemed to be warranted.

(c) *Investigations.*—To make such inquiries and investigations as it may deem to be warranted regarding the administration and effect of the provisions of this article and of ordinances and rules adopted in accordance therewith, and to make such recommendations to the director and to the mayor and aldermen as in its judgment may be warranted in the premises.

(d) *Decisions.*—To consider and determine any matter involved in the administration and enforcement of this article and the rules and ordinances adopted in accordance therewith that may be referred to it for decision by the director, or on appeal by any appointing authority, employee or taxpayer of the city, from any act of the director or of any appointing authority.

The decision of the commission in all such matters shall be final, subject, however, to any right of action under any law of the state or of the United States.

(e) *Director.*—To hold an examination for the position of director, whenever eligibles therefor are needed, and to certify eligibles resulting therefrom to the mayor, and also to perform all such duties with reference to that position as are assigned to the director as to all other positions in the classified service; and

(f) *Reports.*—To transmit to the mayor and aldermen, with such additions and comments as it may desire to make, such annual and special reports as the director of personnel may submit for its action.

(g) *Reinstatement of employes.*—To order the reinstatement without loss of pay of any employe who has been discharged, demoted or reduced in rank or compensation for religious, racial or political reasons.

(h) *Limitations.*—Except as provided in this section, the commission shall have no administrative powers or duties. Except as so provided, it shall have no power to direct or control any employe of the department of personnel or other employe of the city, or the action to be taken by any of them in any matter or case. Neither the commission nor any of its members shall have power to take any action except by majority vote in meeting assembled.

Sec. 8—*Director of personnel—Appointment; qualifications; compensation.*—The director of personnel shall be appointed by the mayor from a certification of eligibles made by the civil service commission from an eligible list established by means of competitive tests of fitness conducted by the civil service commission, within thirty days after such certification. One of the three eligibles standing highest on such certification who have all such duties with reference to that position as are assigned to

indicated their willingness to accept appointment shall be appointed by the mayor. The commission shall secure such information and assistance as may be practicable in formulating the fitness tests for director and rating the results, from persons experienced in public personnel administration.

Any person to become eligible for appointment as director shall have had not less than five years' experience in personnel administration, of which not less than two years shall have been in public personnel administration, and shall be conversant with the principles and techniques of modern public personnel administration. He need not be at the time of examination or appointment, a resident of the City of St. Louis.

All action under this section shall be subject to the other provisions of this article and the rules adopted in pursuance thereof, as far as consistent with this section.

The commission shall fix the initial salary of the director at not less than six thousand dollars a year to be in effect until a compensation plan is adopted hereunder. Thereafter the salary of the director shall conform to such compensation plan.

Sec. 9. Director's powers and duties generally; removal from office.—The director shall be the head of the department of personnel, responsible for the conduct of all of its affairs except as to such powers and duties as are vested in the commission by this article. He shall have power and it shall be his duty, in person or through the department of personnel:

(*a*) *Secretary of commission.*—To serve as secretary of the commission, to see to the keeping of the minutes and records thereof, to conduct investigations and prepare reports for the commission in matters under its consideration, and in all other proper ways to facilitate the actions and proceedings of the commission.

(*b*) *Appointment of employes; administration.*—To appoint all employes of the department of personnel except the director and the members of the commission, and to direct and control their work and, under the customary financial procedures of the city, the expenditures from appropriations for the department.

(*c*) *Roster of employes.*—To establish and maintain a roster of all city employes showing the salient facts of the employment history of each employe.

(*d*) *Preparation of rules.*—To prepare and recommend, for action by the commission, rules, including a classification plan and a service rating plan, drafts of ordinances for recommendation to the mayor and aldermen in matters requiring such ordinances, including a compensation plan, and changes as deemed desirable from time to time in such rules and ordinances.

(*e*) *Classification of positions.*—To allocate each position in the classified service to its appropriate class in the classification plan adopted under the provisions of this article, and reallocate positions as conditions warrant, from class to class.

(*f*) *Definitions of classes and grades.*—To prepare and maintain appropriate definitions of classes and grades in the classification plan and amend them from time to time as he may deem such action warranted.

(*g*) *Eligible lists.*—To hold examinations, pass upon the qualifications of applicants, and establish eligible lists, as needed, and to certify names of eligibles to appointing authorities for filling vacancies in competitive positions.

(*h*) *Employe programs.*—To cooperate with appointing officers and others in providing programs of training for employes, for employe welfare, for promoting of employe morale, and for otherwise raising of standards of performance in the service in every practicable way.

(*i*) *Employment transactions.*—To pass upon, for compliance with the provisions of the charter and ordinances and these rules, and approve or disapprove as to compliance therewith, all appointments, demotions, transfers, promotions, service ratings, leaves of absence, changes in rates of pay, suspensions, separations, and other employment transactions affecting the status of employes.

(*j*) *Investigations.*—To make such investigations as he may deem desirable with respect to the enforcement and effect of the personnel provisions of the charter and ordinances and of the rules, and such special investigations as the commission or the mayor may request and make special reports relative thereto.

(*k*) *Compensation plan.*—To devise and recommend to the commission a compensation plan consisting of scales of pay for the several grades or classes in due relation to each other and to rates prevailing for like employment in private industry, rules for the interpretation and application of the plan, and changes in such plan and rules from time to time as deemed desirable.

(*l*) *Administrative regulations.*—To make such administrative regulations as he may deem necessary, not inconsistent with the charter, ordinances applicable and these rules, relative to matters involved in the administration of the personnel provisions of such charter ordinances and rules.

(*m*) *Reports.*—To make annual reports to the commission for its approval and transmission to the mayor and aldermen on the work of the department and the administration and effect of this article, with such recommendations for action as he may deem desirable, and such special reports as may be requested by the commission or the mayor. Such reports shall be public records.

(*n*) *Nonessential positions.*—To aid the mayor and aldermen, and the several appointing officers, in determining the numbers and kinds of positions needed to carry on the city's

business and in discovering and labeling unnecessary positions in order that they may be designated as supernumerary, so that they may be eliminated as opportunity affords for transfer of the employes to other positions, under the provisions of this article, and so that, as they become vacant, steps may be taken to keep them from being filled.

(*o*) *Assistance to appointing authorities.*—To aid the mayor and aldermen, and appointing authorities in all practicable ways in handling other personnel matters relating to positions under their jurisdictions; and

(*p*) *Additional powers and duties.*—To do all other and further things necessary or proper for making effective the provisions of this article and all rules and ordinances adopted in pursuance thereof, and not inconsistent therewith, whether of the same kinds as those specified in this section, or of different kinds. The power of the director to make effective the provisions of this article and of ordinances shall not be deemed to be contingent on the adoption of rules but, in the absence of rules that are applicable, he shall have power to take such action, not inconsistent with this article or with ordinances pursuant thereto, as may be reasonably necessary and proper to effectuate the purposes thereof.

The personnel director may be removed from office only upon charges of nonfeasance, malfeasance or misfeasance in office and after a public hearing to be held not less than ten days after notice to the director accompanied by a statement in writing of the specific acts charged. The personnel director may be represented by an attorney and shall be entitled to present witnesses in his defense. The public hearing shall be conducted by the civil service commission. At the conclusion of the hearing, the commission shall recommend to the mayor whether or not the personnel director shall be removed from office. The mayor shall have the power to accept or reject the recommendation of the civil service commission and his decision shall be final.

Sec. 10. Selection of examiners and assistants; qualifications of employes.—The director of personnel may select suitable persons in the service of the city, with the consent of the appointing authorities, under whom such persons serve, to act as examiners under his direction or otherwise to assist in the administration of this article and the rules and ordinances adopted thereunder. It shall be deemed part of the official duties of all employes so selected, to render such services without extra compensation therefor and in addition to other qualifications required by this charter, all officers and employes, except day laborers, and except in such cases requiring scientific, mechanical, professional or educational qualifications as may be determined by the civil service commission, must have resided in the city for at least one year and failing or ceasing to so reside, shall forfeit their office or employment.

Sec. 11. Offices and facilities to be provided; unauthorized compensation.—It shall be the duty of all employes of the city to allow the reasonable use of public buildings, and to heat and light them as conditions may require, for holding examinations, and in all other proper ways to facilitate the holding of such examinations. All employes of the city shall grant the director of personnel and any agent authorized by him, free access to the premises, and the records relating to employes, under their control, during the usual business hours, and shall furnish them such facilities, assistance and information as may be required in carrying into effect the provisions of this article and the rules and ordinances adopted thereunder.

After notice to the comptroller by the director that any person is employed or is proposed to be paid as an employe in the classified service in any amount not provided for under the provisions of this article and any rules and ordinances in effect not inconsistent therewith, the comptroller shall be charged with notice thereof and shall not approve any further payment to such person except in accordance with such provisions.

Sec. 12. *Status of persons employed by city when article takes effect.*—Every person who, when this article takes effect, is legally occupying, by regular appointment thereto, a position placed by this article in the classified service, shall be entitled to continue to occupy such position, without further examination for such employment, and shall become subject to the provisions of this article, including the provisions relating to service rating, with the same effect as though he had been appointed to the position occupied, under the provisions of this article. The provisions of this section also shall apply to all persons who, on the date of acquisition of any public utility hereafter acquired by the city, are regularly employed by such utility.

Sec. 13. *Liability of officers and sureties for payment of unauthorized compensation.*—No claim of any person appointed or employed contrary to the provisions of this article or the rules and ordinances thereunder, whose payroll or account is refused approval or payment, shall be paid by the city, but the officer or officers appointing or employing, or attempting to appoint or employ any such person, and the sureties on his or their official bonds, shall be liable jointly and severally for the amount due to such person by reason of such employment or purported employment. No officer, during the time of his official service or thereafter, or his surety, or other person on behalf of either, shall be reimbursed by the city for any sum so paid or recovered. The city counselor, or special counsel designated therefor by the board of aldermen, shall prosecute such actions as may be necessary to recover any sums paid contrary to the provisions of this article from any officer or officers making the appointment or continuing the employment on which such payment was based, in contravention of the provisions of this article or of the rules and ordinances made in pursuance thereof, or any officer signing or countersigning or authorizing the signing or countersigning of any order or warrant for payment, or making any payment, therefor, or from the sureties of any such officer or officers on their official bonds.

Sec. 14. *Examination for licenses.*—The department of personnel, by agreement with any other department or other agency of the city government, may conduct examinations to determine the qualifications of applicants for licenses issued by such department or other agency, and certify the results thereof, subject to reimbursement of the reasonable costs of such service by transfer from the appropriations of the agency served to those of the department of personnel.

Sec. 15. *Unlawful conduct relating to examinations.*—No person shall willfully, by himself or in cooperation with any other defeat, deceive or obstruct any person in respect to his rights in relation to any tests of fitness or appointment to any position under the provisions of this article, and any rules or ordinances made thereunder, or shall willfully and falsely mark, grade, estimate or report upon the tests of fitness or proper standing of any person tested or certified pursuant to the provisions of this article or the service ratings of any employe, or aid in so doing, or shall willfully make any false representation concerning the same, or concerning any person tested, or shall willfully furnish to any person any special or secret information for the purpose of either improving or injuring the prospect or chances of any person in connection with any test or appointment, or shall impersonate any other person or permit or aid in any manner any other person to impersonate him, in connection with any test or appointment, or application or request to be examined.

Sec. 16. *Racial, political and religious discrimination.*—No recommendation or question under the authority of this article shall relate to the race, political or religious opinions, affiliations or service of any person. No person shall be appointed to a position in the classified service hereunder, nor be demoted, reemployed, promoted, removed, increased or reduced in compensation, nor in any other way be favored or discriminated against

in any matter within the purview of this article, because of his race, political or religious opinions, affiliations or service.

(As amended, pursuant to Ord. 43548.)

Sec. 17. *Political assessments and contributions.*—No person in the classified service shall be under any obligation to contribute to any political fund or to render any political service, and no such person shall do so or be removed or otherwise prejudiced for refusing to do so. No person in the city service shall discharge or promote or reduce, or in any manner change the official rank or compensation of any other person in such service, or promise or threaten so to do, for withholding or refusing to make any contribution of money or service or any other valuable thing for any political purpose, or in any other manner, directly or indirectly, use his official authority or influence to compel or induce any other person to pay or render any political assessment, subscription, contribution or service. Every such person who may have charge or control of any building, office or room occupied for any purpose of the government of the city, is hereby authorized to prohibit the entry of any person, and he shall not knowingly permit the entry of any person, for the purpose of therein making, collecting, receiving or giving notice of any political assessment, subscription or contribution; and no person shall enter or remain in any such office, building or room, or send or direct any letter or other writing thereto, for the purpose of giving notice of, demanding or collecting a political assessment, subscription or contribution, nor shall any person therein give notice of, demand, collect or receive any such assessment, subscription or contribution; no person shall prepare or make out, or take any part in preparing or making out, any political assessment, subscription or contribution with the intent that it shall be sent or presented to or collected from any employe in the classified service, and no person shall knowingly send or present any political assessment, subscription or contribution to, or request its payment of, any such employee.

Sec. 18. *Promises of official influence to affect political action.* —No person, while holding any city office, or while in nomination or seeking nomination to appointment to any such office, shall corruptly use or promise to use, directly or indirectly, any official authority or influence, possessed or anticipated, to confer upon any person, or to secure or aid any person in securing, any office or public employment, or any nomination, confirmation, promotion or increase of salary, upon the consideration or condition that the vote or political influence or action of any person shall be given or used in behalf of any candidate, officer or party, or upon any other corrupt condition or consideration. No person, being an officer of the city, or having or claiming any such authority or influence, in relation to the nomination, employment, confirmation, promotion, removal or increase or decrease of salary, of any employe, shall corruptly use, or promise or threaten to use, any such authority or influence, directly or indirectly, to coerce or persuade the vote or political action of any person, or the removal, discharge or promotion of any employe of the city.

Sec. 19. *Political activity of classified employes.*—No person holding a position in the classified service shall use his official authority or influence to coerce the political action of any person or body, or to interfere with any election, or shall take an active part in a political campaign, or shall seek or accept nomination, election or appointment as an officer of a political club or organization, or serve as a member of a committee of any such club or organization, or circulate or seek signatures to any petition provided for by any primary or election law, or act as a worker at the polls, or distribute badges, color or indicia favoring or opposing a candidate for election or nomination to a public office, whether federal, state, county or municipal. But nothing in this section shall be construed to prohibit or prevent any such person from becoming or continuing to be a member of a political club or organization or from attendance upon political meetings, from enjoying entire freedom from all interference in casting his vote, from expressing privately his opinions on all political questions, or from seeking or accepting election or appointment to public office, provided, however, that no active campaign for election shall be conducted by any employe unless he shall first resign from his position.

Sec. 20. *Leave to be granted for purpose of voting.*—On any election day which is not a state or national holiday, the offices of the city shall remain open for business. All employes shall be entitled to vote and whenever necessary may be granted not more than four hours' leave with pay for the purpose of voting.

Sec. 21. *False statements under oath.*—No person knowingly and willfully shall make under oath any false statement in any application or other statement filed with, or in any proceeding before, the director of personnel, or the civil service commission, or in any investigation conducted by the director or the commission.

Sec. 22. *Violations of civil service provisions.*—Any person who shall willfully or through culpable negligence violate or conspire to violate any provision of this article or of any ordinance made pursuant theretofore which no other punishment is provided herein, shall be guilty of a misdemeanor, and, upon conviction thereof in any court of competent jurisdiction, shall be punished by a fine of not less than one hundred dollars and not more than five hundred dollars or by imprisonment for not to exceed six months, or both, in the discretion of the court. The conviction of any employe of any such offense shall operate automatically to terminate his service and to vacate his position. Any employe so removed from the service shall not be reinstated, reemployed or reappointed, or in any other manner re-enter the service of the City of St. Louis for a period of five years from the date of such conviction, and the comptroller and any other fiscal officers responsible for payment of any compensation to such person are hereby charged with notice thereof. Nothing in this section shall be construed to supplant or in any way

affect any prosecution that may be elected to be initiated under any other provision of law relating to the nonfeasance, malfeasance of public officers.

Sec. 23. *Compliance with article and civil service rules.*—It shall be the duty of all employes to conform to and comply with, and to aid in all proper ways in carrying into effect, the provisions of this article, and the rules and ordinances prescribed thereunder. Whenever the director of personnel shall make any order under the provisions of this article or in accordance with any rules or ordinance thereunder, the employe to whom such order is directed shall forthwith comply with the terms and provisions thereof, and any failure or neglect on the part of such employe properly to satisfy or meet the requirements of such order without sufficient justification therefor, shall be construed as grounds for his removal, subject to all rights of appeal and review provided by this article or by ordinance or law.

Sec. 24. *Legal remedies for payment of unauthorized compensation.*—The city counselor, or special counsel designated therefor by the board of aldermen, on complaint of any officer or employe of the city or of any taxpayer, shall prosecute, and of his own motion may prosecute, such action as may be appropriate to restrain the payment of salary or other compensation to any persons appointed to or holding any position in violation of any of the provisions of this article or the rules and ordinances thereunder, or to recover any payment so made, and such right shall not be limited or denied by reason of the fact that such position shall have been classified as, or determined to be, not subject to competitive tests. All money recovered in any action brought under the provisions of this section shall, when collected, be paid into the treasury of the city.

Sec. 25 *Investigatory powers of director; payment of witnesses.*—In the course of any hearing, investigation or tests of fitness conducted under the provisions of this article, the director

of personnel and any other person authorized by him as his representative for such purposes, shall have power to administer oaths, to subpoena and require the attendance of witnesses within the city and the production by them of books and papers pertinent to any matter of inquiry and to examine such witnesses under oath, in relation to any matter properly involved in such proceeding. For such purposes, the director or his authorized representative may invoke the power of any court of record in the city, or judge thereof, in term time or vacation, to compel the attendance and testifying of witnesses and the production of books and papers in compliance with such subpoenas. All witnesses so subpoenaed, who are not employes of the city, shall be entitled to the same fees as are allowed in civil cases in courts of record, which shall be paid upon vouchers approved by the director of personnel from the appropriations of the department of personnel on the audit and warrant of the comptroller.

Sec. 26. *Effect of established title and rates of pay.*—The titles and rates of pay of any positions in the classified service, as set forth in any ordinance or appropriation now or hereafter in effect, shall be deemed to be permissive only, authorizing positions that might properly be designated by such titles and compensated at such rates if so constituted that such titles and rates would apply under the provisions of this article, but not as mandatory in requiring that such titles shall be used to designate such positions to the execution of all others or that payments shall be made at such rates, irrespective of the true nature of the positions existing by virtue of such authority and of whether such titles and rates are appropriate to the positions as actually constituted.

Sec. 27. *Partial invalidity of provisions.*—If any part of this amendment is held by competent authority to be invalid, every other part thereof not so held, shall continue in full force and effect as though such invalid part had not been included therein.

Sec. 28. *Repeal of inconsistent provisions.*—All provisions of the city charter and ordinances and rules thereunder, or parts thereof, inconsistent with this amendment, are hereby repealed.

Sec. 29. *Powers and duties of efficiency board vested in personnel board.*—All powers and duties delegated to the efficiency board by this charter which are not specifically repealed by this amendment are preserved in full force and effect to the personnel department.

Sec. 30. *Effective date.*—This amendment shall take effect immediately, except that pay rolls may be certified and payments be made thereon, under the provisions of previously existing charter provisions, and ordinances and rules applicable thereto, during such temporary period not to exceed one year as is necessary in the opinion of the civil service commission, to provide for the director of personnel, the rules, the classification and compensation plans, the ordinances, the allocation of the existing positions to their appropriate classes and the fixing of the rates of compensation thereunder, and the forms and procedures, necessary for full compliance with the provisions of this article.

(Art. XVIII amended to present form, pursuant to Ord. 42021.)

Supreme Court, U. S.
FILED
AUG 20 1976
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 75-442

JOHN H. POELKER, Mayor of the City of
St. Louis, Missouri,
and
R. DEAN WOCHNER, M.D., Director of Health and Hospitals,
and Acting Commissioner of Hospitals of the
City of St. Louis, Missouri,
Petitioners,

vs.

JANE DOE, and a Class,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI DOCKETED SEPTEMBER 20, 1975
PETITION GRANTED JULY 6, 1976

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 75-442

JOHN H. POELKER, Mayor of the City of
St. Louis, Missouri,
and
R. DEAN WOCHNER, M.D., Director of Health and Hospitals,
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APPENDIX

TABLE OF CONTENTS

	Page
Relevant Docket Entries	1
Complaint for Declaratory Judgment and Injunctive Relief	6
Marshal's Return of Service	13

Defendant's Joint Answer 14
Exhibit No. 1 22
Answers to Interrogatories by Defendant Poelker 23
Exhibit No. 1 31
Exhibit No. 2 32
Exhibit No. 3 33
Exhibit No. 4 35
Exhibit No. 5 36
Plaintiff's Motion for Summary Judgment 37
Affidavit of Plaintiff Jane Doe, Exhibit A 37
Preliminary Memorandum of Authorities Submitted on Behalf of Plaintiff in Support of Her Motion for Summary Judgment 40
Answers to Interrogatories by Defendant Wochner 43
Exhibit No. 1 49
Exhibit No. 2 50
Exhibit No. 3 51
Memorandum and Order Filed January 13, 1975 Is Printed in Petition for Certiorari at Page A-19ff
Motion for Special Orders to Preserve, Guarantee and Effectuate Appellees' Rights to Fair Hearing and Due Process of Law Filed in U.S. Court of Appeals for the Eighth Circuit April 8, 1974 54
Appellant's Reply to Appellees Motion 60
Per Curiam Opinion of the United States Court of Appeals for the Eighth Circuit 62

In the United States District Court
Eastern District of Missouri
Eastern Division

Jane Doe,
Plaintiff,
v.
John H. Poelker, Mayor, et al.,
Defendants.
No. 73-C-565-(A).

DOCKET ENTRIES

1973	Proceedings
Aug. 17	Complaint for declaratory judgment and injunctive relief filed and summons issued.
Sept. 4	Marshal's returns to service of summons/complaint/interrogatories on defts filed (executed 8-20-73 John H. Poelker; 8-28-73 R. Dean Wochner, M.D.)
Sept. 21	Defts' joint answer filed.
Oct. 4	Deft John H. Poelker's answers to plff's interrogs filed.
Oct. 5	Plff's motion for summary judgment, with attached aff. of plff, Jane Doe, and preliminary memorandum of authorities in support of said motion, filed. Oral argument requested.
Oct. 10	Answers to plff's interrogs by deft R. Dean Wochner, M.D., Director of Health and Hospitals, and Acting Hospital Commissioner of the City of St. Louis, Mo, filed.

1974

Feb. 26 Defts' motion to dismiss plff's complaint filed.

Mar. 22 Memo and Order filed. Motion of defts. to dismiss for lack of standing is sustd. Cause dismissed. CC to attys by Ct. Clk.

Mar. 26 Notice of appeal of plff fr Memo & Order of 3-22-74 fld. Copy of appeal sent to attorneys for defendants.

1975

Jan. 13 Memorandum & Order—tld. cause dismissed with prejudice.

Jan. 20 Plff's Notice of Appeal—fld.

Aug. 8 Memo and Order—fld. no attorney's fees allowed to plff.

Order—fld that prohibiting abortions is unconstitutional & that Defts' change their policy on non-therapueutic abortions. Copies sent to attorney's.

Aug. 14 Plff's Notice of Appeal—fld.

GENERAL DOCKET

United States Court of Appeals
for the Eighth Circuit
Eastern District of Missouri

Jane Doe,
Appellant.
vs.
John H. Poelker, Mayor of the City of St. Louis, Missouri, and R. Dean Wochner, M.D., Director of the Department of Health and Hospitals and Acting Hospital Commissioner of the City of St. Louis, Missouri,
Appellees.

Case No. 74-1232.

Date	Proceedings	Filed
1974		
Apr. 8	Motion of appellees for special orders to preserve appellees' rights to fair hearing, etc. Orig & 5 copies)	7
	Appearance for appellees.	
Apr. 11	Reply of appellant to Motion of appellees for Special Orders, etc.	10
June 4	Opinion by J. Ross (Pr.Pub.)	15

GENERAL DOCKET

United States Court of Appeals
for the Eighth Circuit
Eastern District of Missouri

Jane Doe, et al.,
Appellants,
vs.
John H. Poelker, Mayor of the City of St. Louis, Missouri and R. Dean Wochner, M.D., Director of the Dept. of Health and Hospitals and Acting Hospital Commissioner of the City of St. Louis, Missouri,
Appellees.

Case No. 75-1069.

1975	Proceedings	Filed
Apr. 14	Opinion by Judge Ross (printed, published)	12
May 7	Order: (printed, published); petition for rehearing and suggestions for rehearing en banc are denied; pages 11 and 14 are withdrawn and replaced by new pages 11 and 14, attached hereto and by reference made a part hereof	16
June 2	Order: Pages revised by this Court's order of May 7 1975 (12, 13 and 14 of this court's opinion) withdrawn and pages 12 to 20 inclusive, the original of which new pages are attached and by reference made a part hereof. Because of the change in substance of the attorneys' fee portion of the opinion made necessary	

by Alyeska Pipeline, the appellees are given an additional 14 days to file a second petition for rehearing en banc. Such petition shall be limited solely to the changes made in the section of the opinion relating to attorneys' fees, after the ruling on which, the appellee may, if it so desire, renew its request for stay of mandate pending appeal. 24

GENERAL DOCKET

United States Court of Appeals
for the Eighth Circuit
Eastern District of Missouri

Jane Doe, et al.,
Appellants,
vs.
John H. Poelker, Mayor of the City of St. Louis, Missouri, and R. Dean Wochner, M.D., Director of Department of Health and Hospitals and Acting Hospital Commissioner of the City of St. Louis, Missouri,
Appellees.

Case No. 75-1648.

Date	Proceedings	Filed
1976		
Jan. 5	Per curiam opinion (Printed, Published).	9

In the United States District Court for the Eastern District of Missouri, Eastern Division

Jane Doe,

Plaintiff,

vs.

John H. Poelker, Mayor of the City of St. Louis, Missouri,

and

R. Dean Wochner, M.D., Director of the Department of Health and Hospitals and Acting Hospital Commissioner of the City of St. Louis, Missouri,

Defendants.

Cause No. 73C 565(A)

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

(Filed August 17, 1973)

Comes now plaintiff and for her cause of action states:

I. **Jurisdiction**

1. Plaintiff invokes the jurisdiction of this Court under the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution; under United States Code, Title 28, Chapter 85, Section 1343; under United States Code, Title 28, Chapter 151 (Declaratory Judgments), Sections 2201 and 2202; and under United States Code, Title 42, Chapter 21, Section 1983.

2. The defendants are residents of and are to be found within this federal judicial district and division.

3. This is an action for a declaratory judgment and permanent injunction against the existence, application, implementation and enforcement of express and implied policies, rules, regulations, procedures and practices barring, thwarting, limiting and infringing upon the utilization of the personnel, facilities and services of the general, public hospitals of the City of St. Louis, Missouri, namely, Starkloff Memorial Hospital located at 1515 Lafayette within the City of St. Louis, Missouri and Homer G. Phillips Hospital located at 2601 Whittier within the City of St. Louis, Missouri, for the performance of abortions.

II. **Parties**

4. Plaintiff, Jane Doe, is a citizen of the United States and a resident and taxpayer of the City of St. Louis, Missouri and was so at all times hereinafter mentioned. Plaintiff's true identity is contained in a sealed Affidavit which is in the possession of plaintiff's counsel. Said Affidavit has been prepared to protect plaintiff from undue embarrassment and harassment and is available to the Court at its order and convenience.

5. Plaintiff resides with her husband and their two children, both of whom are over seven years of age.

6. Plaintiff's husband is unemployed and faces possible conviction and imprisonment as a result of a recent felony arrest. Plaintiff and her husband cannot afford the expense of another child and plaintiff's consequential loss of employment. Plaintiff and her family are in severe, financial straits and plaintiff is the holder of a City of St. Louis hospital clinic card.

7. Since 1965 plaintiff has incurred a minimum of five miscarriages and is presently pregnant and within the first trimester of said pregnancy.

8. During the month of August, 1973, plaintiff on two separate occasions requested an abortion at said Starkloff Memorial Hospital but was refused the same by physicians of the obstetrical staff and employees of said hospital, acting within the course and scope of their position and employment.

9. Said refusals were based upon the stated policy of said hospitals, as expressed by said physicians, the same being a blanket prohibition against performing abortions.

10. Plaintiff suffers from cervical, fibroid tumors and polyps, a retroverted uterus and trichomycosis. On both occasions she was advised by said hospital, staff physicians to seek an abortion elsewhere and then return to said hospital for an hysterectomy, involving the permanent removal of plaintiff's uterus, oviducts and ovaries, a procedure recommended by said hospital, staff physicians based upon her medical and physical condition.

11. The ordinary and routine medical procedure in plaintiff's situation is to perform the abortion and hysterectomy in one surgical procedure, rather than two separate and distinct procedures, thereby greatly reducing the danger and risk of mortality and morbidity to plaintiff.

12. Plaintiff brings this cause of action on her own behalf and on behalf of the entire class consisting of pregnant, women residents of the City of St. Louis, Missouri desiring to utilize the personnel, facilities and services of the general, public hospitals within the City of St. Louis, Missouri, for the medical termination of said pregnancy. Said class of pregnant, women residents is so numerous that joinder of all members is impractical. There exists substantial questions of law and fact common to the class and the claims of plaintiff are typical of the claims of the class. Plaintiff will fairly and adequately represent the interests of the class.

13. Defendant, John H. Poelker, is the duly elected and acting mayor of the City of St. Louis, Missouri, in said capacity is the chief executive officer of the same and as such exercises control and authority, both express and implied, over the Director of Health and Hospitals, the Health Commissioner and the general, public hospitals of said City, all of whom have a role in the existence, application, implementation and enforcement of the said policies, rules, regulations, procedures and practices herein challenged. Said defendant has on numerous past occasions publicly stated that the medical procedure of abortion will not be allowed in said city's general, public hospitals and the force and weight of his office and statements are largely responsible for the existing situation.

14. Defendant, R. Dean Wochner, M.D., is the duly appointed and acting Director of the Department of Health and Hospitals and Acting Hospital Commissioner of the City of St. Louis, Missouri and in said capacities is the principal and chief medical official of the same, having the authority and responsibility of creating, defining, applying, implementing and enforcing all said city's medical policies, rules, regulations, procedures and practices affecting the operation of said city's general, public hospitals, including those herein challenged.

III. Causes of Action

15. Said express and implied policies, rules, regulations, procedures and practices herein challenged:

a. Interfere with and deprive plaintiff and her respective physician of the right to privacy within the patient-physician relationship and infringe upon said right, the same being protected and guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution;

b. Interfere with and deprive plaintiff of her right to obtain and receive reasonable, medical services according to the highest standards of medical practice, the same being protected and guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution;

c. Interfere with and deprive plaintiff of the fundamental rights of a woman to determine for herself whether to bear children and to maintain her marital privacy in matters respecting marriage, family, sex and procreation, the same being protected and guaranteed by the Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution;

d. Interfere with and deprive plaintiff of the right to receive safe and adequate medical advice and treatment pertaining to the decision of whether to carry a pregnancy to term, the same being protected and guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution;

e. Interfere with and deprive plaintiff of the equal protection of the laws by treating similarly situated classes differently and discriminatorily with no compelling justification for said classification, the same being protected and guaranteed by the Fourteenth Amendment to the United States Constitution; and

f. Interfere with and deprive plaintiff of due process of law by arbitrarily denying her the medical procedure of abortion without justification or cause, thereby subjecting her life and liberties to increased possibility of loss.

V. **Relief Prayed**

Wherefore, plaintiff prays this Court:

16. Issue a declaratory judgment holding that any and all express or implied policies, rules, regulations, procedures and practices, barring, thwarting, limiting and infringing upon the utilization of the personnel, facilities and services of the general, public hospitals of the City of St. Louis, Missouri for the performance of abortions are in violation of the constitutional rights of plaintiff and the class of women similarly situated, as protected and guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.

17. Issue a permanent injunction restraining defendants, their agents, employees, appointees and successors from applying, implementing and enforcing or threatening to apply, to implement or to enforce said policies, rules, regulations, procedures and practices herein challenged in derogation of the rights of plaintiff and said class, inasmuch as plaintiff and said class have no clear nor adequate remedy at law and the continued acts of defendants, if not restrained, will continue to cause irreparable harm and injury to plaintiff and said class.

18. Issue such other and further orders and relief as to the Court may seem meet and proper and to tax all costs herein to defendants.

FRANK SUSMAN, of the American
Civil Liberties Union of Eastern Missouri
Attorney for Plaintiff
705 Olive
St. Louis, Missouri 63101
(314) 621-2030

RICHARD D. BARON, of the American
Civil Liberties Union of Eastern Missouri
Attorney for Plaintiff
8011 Clayton Road
St. Louis, Missouri 63117
(314) 862-2525

GENE SCHULTZ, of the American
Civil Liberties Union of Eastern Missouri
Attorney for Plaintiff
4355 Maryland
St. Louis, Missouri 63108
(314) 652-6491

BURTON W. NEWMAN, of the American
Civil Liberties Union of Eastern Missouri
Attorney for Plaintiff
705 Olive Street
St. Louis, Missouri 63101
(314) 621-2030

U.S. MARSHALS SERVICE
INSTRUCTION AND PROCESS RECORD

INSTRUCTIONS: See "INSTRUCTIONS BY THE U.S. MARSHAL" on the reverse of the last (No. 5) copy of this form. Please type or print legibly, insuring readability of all copies. Do not detach any copies.

SERVICE OF PROCESS

PLAINTIFF: Jane Doe — COURT NUMBER: 73C 365(A)

DEFENDANT: John H. Poelker and R. Dean Wochner — TYPE OF WRIT: Summons & Interrogs

SERVE / AT

NAME OF INDIVIDUAL, COMPANY, CORPORATION, ETC., TO SERVE OR DESCRIPTION OF PROPERTY TO SEIZE OR CONDEMN: R. Dean Wochner, M.D.

ADDRESS (Street or RFD, Apartment No., City, State and ZIP Code): City Hospital, Starkloff Memorial, 1515 Lafayette, St. Louis, MO OR 8121 Pershing, St. Louis, MO 63130

SEND NOTICE OF SERVICE COPY TO NAME AND ADDRESS BELOW:

Frank Susman
705 Olive Street
St. Louis, MO 63101

Show number of this writ and total number of writs submitted, i.e., 1 of 1, 1 of 3, etc.: NO. 1 OF TOTAL 2

CHECK IF APPLICABLE: ☐ One copy for U. S. Attorney or designee and two copies for Attorney General of the U. S. included.

SHOW IN THE SPACE BELOW AND TO THE LEFT ANY SPECIAL INSTRUCTIONS OR OTHER INFORMATION PERTINENT TO SERVING THE WRIT DESCRIBED ABOVE.

SPECIAL INSTRUCTIONS:

FILED SEP 4 1973 U.S. Dist. Clerk E. Dist. Mo. St. Louis

NAME AND SIGNATURE OF ATTORNEY OR OTHER ORIGINATOR: Frank Susman — TELEPHONE NUMBER: 621-2030 — DATE: 8/17/73

SPACE BELOW FOR USE OF U.S. MARSHAL ONLY - DO NOT WRITE BELOW THIS LINE

Show amount of deposit (or applicable code) and sign USM-285 for first writ only if more than one writ submitted.	DEPOSIT/CODE	DIST. OF ORIGIN	DISTRICT TO SERVE	LOCATION OF SUB-OFFICE OF DIST. TO SERVE
I acknowledge receipt for the total number of writs indicated and for the deposit (if applicable) shown.	SIGNATURE OF AUTHORIZED USMS DEPUTY OR CLERK: B Brunhoeber			DATE: 8-17-73

☑ I hereby certify and return that I have personally served, have legal evidence of service, or have executed as shown in "REMARKS," the writ described on the individual, company, corporation, etc., at the address shown above or on the individual, company, corporation, etc., at the address inserted below.

☐ I hereby certify and return that, after diligent investigation, I am unable to locate the individual, company, corporation, etc., named above within this Judicial District.

NAME AND TITLE OF INDIVIDUAL SERVED (If not shown above): ☐ A person of suitable age and discretion then abiding in the defendant's usual place of abode.

ADDRESS (Complete only if different than shown above): 1515 Lafayette City Hospital #1

FEE (If applicable): $3.00 — MILEAGE: $.48

DATE(S) OF ENDEAVOR (Use Remarks if necessary): DATE OF SERVICE: 8-28-73 — TIME: 10 AM/PM — SIGNATURE OF U. S. MARSHAL OR DEPUTY: Julia A. Schlueter

REMARKS: 8-27-73 HOME ILL. 2 mi

1

USM 285 (Ed. 7-1-70) — 1. CLERK OF THE COURT

45:3201 45:3361

U.S. MARSHALS SERVICE
INSTRUCTION AND PROCESS RECORD

INSTRUCTIONS: See "INSTRUCTIONS BY THE U.S. MARSHAL" on the reverse of the last (No. 5) copy of this form. Please type or print legibly, insuring readability of all copies. Do not detach any copies.

SERVICE OF PROCESS

PLAINTIFF: Jane Doe — COURT NUMBER: 73C 565(A)

DEFENDANT: John H. Poelker and R. Dean Wochner — TYPE OF WRIT: Summons & Interrogs

SERVE / AT

NAME OF INDIVIDUAL, COMPANY, CORPORATION, ETC., TO SERVE OR DESCRIPTION OF PROPERTY TO SEIZE OR CONDEMN: John H. Poelker, Mayor

ADDRESS (Street or RFD, Apartment No., City, State and ZIP Code): City Hall, 1200 Market Street, St. Louis, MO 63103, OR 4555 Dryden, St. Louis, MO

SEND NOTICE OF SERVICE COPY TO NAME AND ADDRESS BELOW:

Frank Susman
705 Olive Street
St. Louis, MO 63101

Show number of this writ and total number of writs submitted, i.e., 1 of 1, 1 of 3, etc.: NO. 2 OF TOTAL 2

CHECK IF APPLICABLE: ☐ One copy for U. S. Attorney or designee and two copies for Attorney General of the U. S. included.

SHOW IN THE SPACE BELOW AND TO THE LEFT ANY SPECIAL INSTRUCTIONS OR OTHER INFORMATION PERTINENT TO SERVING THE WRIT DESCRIBED ABOVE.

SPECIAL INSTRUCTIONS:

FILED SEP 4 1973 U.S. Dist. Clerk E. Dist. Mo. St. Louis

NAME AND SIGNATURE OF ATTORNEY OR OTHER ORIGINATOR: Frank Susman — TELEPHONE NUMBER: 621-2030 — DATE: 8/17/73

SPACE BELOW FOR USE OF U.S. MARSHAL ONLY - DO NOT WRITE BELOW THIS LINE

Show amount of deposit (or applicable code) and sign USM-285 for first writ only if more than one writ submitted.	DEPOSIT/CODE	DIST. OF ORIGIN	DISTRICT TO SERVE	LOCATION OF SUB-OFFICE OF DIST. TO SERVE
I acknowledge receipt for the total number of writs indicated and for the deposit (if applicable) shown.	SIGNATURE OF AUTHORIZED USMS DEPUTY OR CLERK: B Brunhoeber			DATE: 8-17-73

☑ I hereby certify and return that I have personally served, have legal evidence of service, or have executed as shown in "REMARKS," the writ described on the individual, company, corporation, etc., at the address shown above or on the individual, company, corporation, etc., at the address inserted below.

☐ I hereby certify and return that, after diligent investigation, I am unable to locate the individual, company, corporation, etc., named above within this Judicial District.

NAME AND TITLE OF INDIVIDUAL SERVED (If not shown above): Karen Kovac Secretary To The Mayor — ☐ A person of suitable age and discretion then abiding in the defendant's usual place of abode.

ADDRESS (Complete only if different than shown above)

FEE (If applicable): $3.00 — MILEAGE: $

DATE(S) OF ENDEAVOR (Use Remarks if necessary): DATE OF SERVICE: 8-30-73 — TIME: 1 PM — SIGNATURE OF U. S. MARSHAL OR DEPUTY: Robert W. Smith

REMARKS

14

USM-285 (Ed. 7-1-70) — 1. CLERK OF THE COURT

In the United States District Court
Eastern District of Missouri
Eastern Division

(Title Omitted in Printing)

DEFENDANTS' JOINT ANSWER

(Filed September 21, 1973)

Come now the defendants and make their joint Answer, respectfully stating and informing the Court as follows, to wit:

I. **Admissions and Denials**

1. Deny paragraph 1.

2. Admit paragraph 2.

3. Deny paragraph 3.

4. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12.

5. Defendants deny paragraph 13; and answer further that defendant Poelker being Mayor of the City of St. Louis is the chief executive officer of such City and has State of Missouri statutory, Charter of St. Louis, and City of St. Louis ordinance, duties, responsibilities, rights, privileges and authority as such laws provide.

6. Defendants admit that defendant R. Dean Wochner, M.D., is the duly appointed and acting Director of Health and Hospitals and is acting Hospital Commissioner of the City of St. Louis, but deny the remainder of the allegations of paragraph 14; and

answer further that defendant Wochner as the occupant of said offices has such duties, responsibilities, rights, privileges and authority as the laws of the State of Missouri, the Charter and ordinances of the City of St. Louis provide for such offices.

7. Deny paragraph 15 and each of its dependent paragraphs a, b, c, d, e, and f.

II. **Further Defenses**

8. The performance of abortions for reasons other than for the physiological grave injury or life of the mother is felonious under the laws of the State of Missouri, and against the public policy of such state: and the validity of such legal status of the laws of the State of Missouri is presently under litigation in the courts of the United States separate and apart from this action.

9. The hospitals of the City of St. Louis were created and exist for the care and treatment of the sick, injured, and those requiring medical services as recognized under the laws of the State of Missouri, the City of St. Louis, and within the public policy of the State and City.

10. Abortion, for reasons other than to save the mother from grave physiological injury or death, is against and contrary to the laws and public policy of the State and City.

11. Abortion, for reasons other than to safeguard the mother from grave physiological bodily injury or death, has never been within those medical services rendered by the hospitals of the City of St. Louis and has been both illegal (as aforesaid) and outside of, contrary to and prohibited by medical policies and judgment of the medical authorities of such hospitals.

12. The City and its inhabitants, acting through duly empowered representatives, has the right to make reasonable determinations as to what medical services shall be supplied in

the public hospitals of such City; and abortion, other than to protect the mother from grave physiological injury or death, is a medical procedure which lawfully can and has been reasonably excluded from such services given by the City's hospitals.

13. The plaintiff, and any of her class, has no legal right to require the City of St. Louis to abort her or their pregnancies under circumstances where there is no grave threat to her physiological safety or life.

14. To require the City of St. Louis to abort the plaintiff, or any members of her class, under circumstances violative of the aforesaid laws, public policy and medical judgment, through the assertion or claim of a United States constitutional right would be a violation of the Ninth and Tenth Amendments of the United States Constitution, and a resulting deprivation of the individual, distributive and collective rights of the people of the State of Missouri and the inhabitants of the City of St. Louis to due process of law under the Fifth and Fourteenth Amendments of the United States Constitution.

15. The plaintiff, and any members of the purported class, have a clear and adequate remedy at law.

16. The plaintiff, and any members of the purported class, have failed to state a Federal claim for which relief can be granted.

17. Plaintiff, and any members of the purported class are not entitled to injunction to protect against irreparable harm since plaintiff and such class have the present capacity and ability to secure such medical services for abortion at other medical service facilities or institutions which are performing abortions for women under plaintiff's alleged circumstances.

18. The State of Missouri has enacted *"House Committee Substitute for House Bills Nos. 731 and 793,"* a true copy of which is attached hereto and made a part hereof by reference as

Defendant's Exhibit No. 1. Such statute provides that no public hospital of the State of Missouri shall be required to treat or admit for treatment any woman for the purpose of abortion if such treatment or admission for treatment is contrary to the established policy of such public hospital. By force and right conferred by such statute the City of St. Louis in the operation of its public hospitals (including the Max C. Starkloff Memorial Hospital), has determined that abortions other than to save the life of the mother shall not be performed in its hospitals; as a consequence, neither the plaintiff nor any other pregnant woman desiring an abortion for reasons other than to save her life, have any right to have such abortion performed in the City Hospitals of the City of St. Louis.

19. The United States Government, in all its departments and through all its officials, is required, to respect and regard as a rule of decision the positive law of the State of Missouri, namely, "House Committee Substitute For House Bills Nos. 731 and 793;" to accord due process of law to the State of Missouri and the City of St. Louis in deciding any alleged right of plaintiff to coerce the violation of such statute by Federal action in accordance with the Fifth and Fourteenth Amendments to the United States Constitution, and according to the modalities of Title 28, Sections 2281 through 2284, inclusive.

20. The plaintiff is governed by the provisions of "House Committee Substitute For House Bills Nos. 731 and 793," and the State of Missouri has reserved to itself and not delegated to the United States in accordance with the Ninth and Tenth Amendments of the United States Constitution, the right to determine whether abortions shall or shall not be performed in the public hospitals of the City of St. Louis, a municipal corporation and political subdivision of the State of Missouri.

21. The adjudication of the merits of the issues raised in this action cannot be made without the presence as a party the City

of St. Louis, a municipal corporation, the State of Missouri, and the husband of the plaintiff.

22. Principles of Federal-State relations, comity, and Federal abstention militate against resolution of the plaintiff's claims by this Court.

23. Plaintiff has an adequate and sufficient remedy at law.

24. Plaintiff has failed to exhaust adequate and sufficient remedies existent in the State Courts of the State of Missouri.

25. Plaintiff's claims are not properly within the scope or purview of the rights and relief to be afforded under 42 U.S.C. 1983.

26. Neither the Court nor the defendants have any present basis upon which to evaluate the plaintiff's standing as a fit subject of the equitable powers of this Court.

27. Plaintiff is not properly a representative of a class of persons entitled to maintain this action.

28. Plaintiff has not demonstrated or shown irreparable harm or the threat thereof if Federal injunctive relief is denied.

29. All qualified natural persons have an inalienable natural right to participate in the institution of marriage, which no government has any lawful right to deny or substantially interfere with.

30. All natural persons have a natural and inalienable right to the preservation, continuance of and protection of the institution of marriage, and no government has any lawful right to disparage, deny and substantially interfere with.

31. Marriage has an unalterable nature required by its ends and purposes which cannot be substantially changed, altered, denied or interfered with without destroying the institution

itself and the rights of persons of the society and state in which they exist.

32. Marriage is an institution essentially composed of a tripartite relationship of the State, a male as husband and a female as wife; each party assumes essential legal and natural obligations and duties, and is possessed of certain rights and privileges which cannot be abrogated without destroying the relationship, and in consequence the institution.

33. Marriage has as a part of its essential nature a union of a male as husband and a female as wife in spiritual and physical union employing their respective faculties for the begetting and nurture of children in a family, for perfection of the members of the family, the propagation of the human race, the continuance of the family and the state, and for the welfare and mutual protection of the individual members of the state, and the state.

34. The aforesaid institution of marriage in its essential nature antedates the *Common Law of England* and was incorporated into such Common Law from inception as possessed of said Judeo-Christian precepts and characteristics; such institution with its essential nature was a part of the Colonial Law of England in the United States prior to separation, and was later included within the highest positive law of the United States through recognition of inalienable natural rights of persons and institutions by the *Declaration of Independence of the United States*, later adopted Constitution of the United States and all amendments thereto, and in the traditions and fundamental principles of inalienable natural rights of persons, in the United States and each State of the United States at all times including the present.

35. The people of the United States, and the people of the several States of the United States, have by force of the application of the Ninth Amendment and the operation of the Tenth

Amendment to the United States Constitution, reserved to themselves and have not delegated to the United States, its departments or officials the power to substantially alter, change, modify or degrade the institution of marriage, by interfering with or negating one of the essential attributes of such institution as it is recognized, established and obtains under the law, traditions and fundamentals of the several States of the Nation and the positive and common law of the several States, including the State of Missouri.

36. The people of the United States, and particularly the people of the State of Missouri, have a natural right, and a United States Constitutional right, to have the Government of the United States, including its judiciary, protect, conserve and guard the institution of marriage in its essential character aforesaid, and to not disturb, negate and destroy such institution by purporting to grant to a female within such institution a unilateral, unconditional right to decide whether to bear children resulting from such marriage, and to carry out through abortion her negative decision.

37. For the Government of the United States to purport to grant such right to such a female as aforesaid, including plaintiff, is a fundamental violation of the natural rights of the people of the United States and particularly the people of the State of Missouri, and of the Constitution of the United States by asserting powers prohibited by Article IX of the Amendments of said Constitution and not delegated but reserved by the people according to Article X of the Constitution.

38. For the Government of the United States to purport to grant such right to such female as aforesaid, including plaintiff, is a fundamental violation of the distributive and individual natural rights of a male as husband in the marriage relationship and in violation of his individual and distributive rights as a person entitled to the protection of the laws of the State

of Missouri and powers of the people reserved by the Ninth Amendment and non-delegated pursuant to the Tenth Amendment; and such violations deny each such male the guarantee of due process of law under the Fifth and Fourteenth Amendments of the United States Constitution.

39. For the United States Government to so alter the institution of marriage in its essential nature and character would be a purported amendment of the Constitution of the United States by a method or way unauthorized by said Constitution and particularly Article V thereof, in violation of said Ninth and Tenth Amendments of the United States Constitution and a violation of the distributive individual rights of the people of Missouri, and persons, particularly the husband in each marriage existent of the State of Missouri, to due process of law under the Fifth and Fourteenth Amendments of the United States Constitution.

Wherefore, defendants having made good and sufficient answer, they pray that the plaintiff's case be dismissed and defendants be allowed to go hence with their costs herein expended.

Respectfully submitted,

JACK L. KOEHR
City Counselor

EUGENE P. FREEMAN
Deputy City Counselor

Attorneys for Defendants
Room 314, City Hall
1200 Market Street
St. Louis, Missouri 63103
453-3366

(Affidavit of service omitted in printing.)

Defendants' Exhibit No. 1

First Regular Session

[Truly Agreed to and Finally Passed]

House Committee Substitute for
HOUSE BILLS NOS. 731 & 793

77th General Assembly

AN ACT

Relating to abortions

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section 1. No physician or surgeon, registered nurse, practical nurse, midwife or hospital, public or private, shall be required to treat or admit for treatment any woman for the purpose of abortion if such treatment or admission for treatment is contrary to the established policy of, or the moral, ethical or religious beliefs of, such physician, surgeon, registered nurse, midwife, practical nurse or hospital. No cause of action shall accrue against any such physician, surgeon, registered nurse, midwife, practical nurse or hospital on account of such refusal to treat or admit for treatment any woman for abortion purposes.

Section 2. No person or institution shall be denied or discriminated against in the reception of any public benefit, assistance or privilege whatsoever or in any employment, public or private, on the grounds that they refuse to undergo an abortion, to advise, consent to, assist in or perform an abortion.

Section 3. Any person who shall deny or discriminate against another for refusal to perform or participate in an abortion shall be liable to the party injured in an action at law, suit in equity or other redress.

In the United States District Court
Eastern District of Missouri
Eastern Division

(Title omitted in printing)

ANSWERS TO INTERROGATORIES

(Filed October 4, 1973)

Comes now, John H. Poelker, Mayor of the City of St. Louis, Missouri, and makes his answers to written interrogatories served with the Complaint and Summons on August 20, 1973.

Respective of the designations identifying the plaintiff's questions, I answer stating as follows, to wit:

1. City Hospital rules and regulations exemplified by "by-laws;"

a.

i) Max C. Starkloff Hospital; adopted March 1972;

ii) Homer G. Phillips Hospital; adopted April 29, 1968, and revised May 26, 1971.

b.

i) Max C. Starkloff Hospital:

"PART II—RULES AND REGULATIONS

"E. General Rules Regarding Abortions and Sterilizations

"If an operation to accomplish sterilization is recommended by the physician for medical indications, the recorded opinion of a knowledgeable consultant should be obtained.

"If sterilization is requested by the patient and the physician agrees, consultation is not necessary.

"A valid permission for a sterilization procedure for a married patient requires the written consent of the spouse when available.

"Whenever the married patient claims dissertion or for reasons of mental incompetency a notarized affidavit will be submitted in lieu of the spouse's written consent.

"In all cases where sterilization is performed primarily or results from an indicated operation, it is important that the patient understand that restoration of fertility is unlikely.

"Therapeutic abortion (the removal with legal justification of the human fetus from its mother prior to viability) will be performed only for medical reasons or indications.

"Prior to the performance of a therapeutic abortion, two consultants must agree in writing that the medical indications justify such procedure."

ii) Homer G. Phillips Hospital:

"Article III, Section 4. Committees

"6. The Abortion and Sterilization Committee consists of the Chief of Ob-Gyn, a member of his Department and one additional member of the Medical Staff. It reviews related problems referred by members of the Medical Staff.

It reviews the compliance of the staff with the performance of abortions or sterilizations only as set forth in the rules and regulations."

"Rules and Regulations (p. 10)

"21. Therapeutic abortion, the removal with legal justification of the human fetus from its mother prior to viability, and procedures designed solely to prevent future pregnancies shall be performed only under the following circumstances:

a. Adequate medical reason or justification must be documented.

b. Two consultants, one of whom must be the Chief of the Ob-Gyn Service or his deputy must agree in writing that the medical indications justify such procedure.

c. The consultants must be members of the Medical Staff.

d. Whenever the medical indication for the therapeutic abortion or sterilization involves a specialty other than Ob-Gyn, one additional consultant from that specialty shall be added. All consultants must agree.

e. The request for therapeutic abortion or sterilization procedure must be signed by the patient or her guardian if she is a minor and by her spouse if he is available and be notarized.

"These provisions do not apply when sterilization is an incidental result of the surgical treatment of a serious disease."

2. None. (I am relying upon a statement made personally to me on September 21, 1973, by Dr. R. Dean Wochner, Director

of Health and Hospitals, and Acting Commissioner of Hospitals, of the City of St. Louis.)

3. a) It is my understanding that the laws of the State of Missouri prohibiting abortions other than to save the life of the mother, are incorporated in and reflected by like rules, regulations and requirements of all of the State of Missouri medical licensing boards for physicians and hospitals, and these would prohibit the City's medical personnel from legally and ethically performing abortions contrary to such laws and regulations in the City's hospitals.

b) Pregnancy not being considered an illness, for the City to commit any significant part of its medical resources to terminations of pregnancies through abortion, would work to cause a consequent reduction of care, treatment and services to other persons suffering from illnesses due to such allocation of the limited medical resources of personnel facilities, medicines, etc., available.

c) The City annually assesses a broad range of sociological (including medical) needs of its inhabitants, and within its financial capabilities and allocates for the relief of such needs, municipal funds through budget appropriations; the current allocation of municipal funds for the City's hospitals do not include any recognition of any requirement to provide non-therapeutic abortions, since such abortions have never before been considered a legal or an ethical medical procedure which ought to be provided for by expenditure of public funds; to employ the resources of various kinds required to the performance of such abortions would be a diversion and misuse in violation of the appropriations for the City's hospitals.

d) Performance of any significant number of non-therapeutic abortions at the present time when there has been no provision for the accommodation of the hospital staff, facilities or resources to such use, and there exists no arrangements for the accommo-

dation of the other usual and continuing functions of the hospital to such a change, would be disruptive and would cause an adverse interference with the normal medical operations of the City's hospitals.

4. Yes.

a) On May 21, 1973, at my office in City Hall, Mr. Philip Sutin, a reporter of the Post-Dispatch newspaper, asked me what action the City might take in reference to abortions as a result of a United States Court decision which occurred on May 18, 1973, holding that the State of Missouri laws on abortion were unconstitutional. As best I can recall, my response was in substance that it was my intention to maintain the policy at City hospitals which excludes the performance of abortions for other than therapeutic purposes. This statement was reported on in the Post-Dispacth, commencing that day (5-21-73) and repeatedly thereafter. Further, thereafter, in the course of meetings with representatives of the various news media and other persons having some interest in the subject, I have many times and at various places, repeated the substance of my aforesaid answer to Mr. Sutin. I have made the same substantive statement (as later herein recounted) to Dr. R. Dean Wochner, Director of Health and Hospitals (and Acting Hospital Commissioner), and the City Counselor, Honorable Jack L. Koehr, in the course of my discussions of the question of the performance of abortions in the City hospitals, with these City officials.

I cannot recall, and have no means to establish, the exact dates, wording, times and places, identities and addresses of persons, and to whom, when I repeated the above statement to others (except as noted). But to answer as fully as possible, I attach the following exhibits, namely:

Exhibit 1; a true copy of a letter sent by me to a Mr. Thomas A. Watters of 4494 Lindell Boulevard, St. Louis, Missouri;

Exhibit 2; a news release of my office dated Thursday, May 24, 1973;

Exhibit 3; a news release of my office dated Thursday, July 26, 1973;

Exhibit 4; a true copy of a letter I sent by me to a Mrs. B. Albrecht of 5231 Bancroft Avenue, St. Louis, Missouri, dated August 28, 1973;

Exhibit 5; a true copy of a letter by me to a Mrs. Penelope Fiedler of 10647 Mentz Hill Acres, St. Louis, Missouri 63128, dated September 4, 1973.

These exhibits give a truthful representative idea of my utterances. The letters to private persons are representative of such correspondence with a number of persons varying between one hundred (100) and one hundred and fifty (150) who wrote to me on the subject expressing agreement or disagreement with my statement. Further, tape recordings were made of my news conferences with representatives of the media; however, these are kept for only a week (not transcribed) and routinely erased, and therefore are not available at this time after erasure.

Before I became Mayor, I have no direct recollection of commenting on the question of abortions in City hospitals; however, I am sure that if I was asked I declared my personal opposition to performing abortions (i.e., non-therapeutic).

5. Yes.

6. **On May 19, 1973,** at an hour unknown, by telephone I called Doctor Wochner from my office in City Hall to him at his office (1625 South 14th Street, St. Louis, Mo.). The occasion for the phone call was the fact that the day before (as reported by the news media) a United States Court in Kansas City had ruled that the State of Missouri laws prohibiting non-therapeutic abortions were unconstitutional and there were contemporaneous news media accounts of statements of the At-

torney General of Missouri and Doctor Wochner, as Director of Health and Hospitals of the City of St. Louis, about the effect of the Court's rulings on the respective areas of interest. I understood Doctor Wochner's remarks in the media to mean that he was going to commence the offering of non-therapeutic abortion services in the City's hospitals. The statements of the Attorney General were to the effect that an appeal would be made from the Court's ruling and therefore the case was not final and binding in Missouri. I discussed the situation with Doctor Wochner and made clear to him my opposition to changing the policy and regulations prohibiting non-therapeutic abortions in the City's Hospitals. At the time we agreed to meet on the subject at my office on May 24, 1973, and to have Mr. Koehr, the City Counselor, present for clarification of the legal status of the law relating to abortions in the City's hospitals.

On May 24, 1973, a meeting was held in my office (exact hour unknown) between Doctor Wochner, Mr. Koehr, and me, as previously arranged. At this meeting the City Counselor explained initial consideration showed that the legal situation regarding the rights of the City to prohibit or the duty to make available non-therapeutic abortions in its hospitals was unsettled or not fixed. I instructed the City Counselor to continue his research and consideration of the question. I instructed Doctor Wochner to make no change in the City's position regarding non-therapeutic abortions, but to consult with his medical staff to develop and report to me his recommendations for suggested changes which would be occasioned if the United States Supreme Court and the Federal Court in Kansas City decisions are determined to require the performance of such abortions in the City's hospitals. A news release was made, exemplified by *Exhibit 2*, above.

On July 18, 1973, I convened another meeting in my office (exact hour unknown) betwen Doctor Wochner and Mr. Koehr. The principal reason for the meeting was to discuss the merits

of two Aldermanic Board Bills which had been passed and sent to me for approval. These Broad Bills were No. 58 and 59, respectively, relating to licensing abortion clinics, and regulating abortions performed in the City. I considered Doctor Wochner's views and recommendations, and Mr. Koehr's legal opinion resulting from his office's research and consideration of legal authorities; also, incidental to the exchange between us at the meeting, I again reiterated my previous opposition to the performance of non-therapeutic abortions at the City's hospitals unless required by law.

Acting upon the advice of my medical and legal officers, I approved Board Bill No. 58, and disapproved Board Bill No. 59, on July 26. A news release, stating my reasons was on such date made, and is exemplified by *Exhibit 3*, above.

These are three instances in which I gave any instructions on the question of the performance of non-therapeutic abortions in the City's hospitals. Doctor Wochner is the only person I have given such instructions. Any other statements made by me in this regard, if made, are at this time unknown and would have been of a most casual nature and would have been consistent with the context and instructions explicitly set out foregoing for the three (3) instances; no orders or instructions were given to others.

Other than as recorded in the exhibits attached, I cannot accurately recount the exact wording of my remarks or statements.

The identity and location of the persons involved (i.e., Ques. "c.") are set out above.

/s/ JOHN H. POELKER

State of Missouri }
City of St. Louis } ss.

Before me, on this 4th day of October, 1973, John H. Poelker, of lawful age, being first duly sworn, upon his oath, did say that he is the Mayor of the City of St. Louis, Missouri, and a defendant in the above-styled case to which the foregoing instrument relates, and he did further state that his answers in such instrument are true to the best of his knowledge, information and belief.

Subscribed and sworn to before me, this 4th day of October, 1973.

EDGAR L. ESKER
Notary Public

(Seal)

My Commission expires: 11-19-75.

Exhibit No. 1

May 23, 1973

Mr. Thomas A. Watters
4494 Lindell Boulevard
St. Louis, Missouri 63108

Dear Mr. Watters:

Thank you for taking the time to express your concern with respect to the stand I have taken against abortions.

The recent Supreme Court ruling was not a mandate which forces all health institutions to make abortion services available. Rather, it was a ruling which gives health centers a choice to make such a service available or not as is seen fit.

My decision not to allow abortions to be performed in our two city hospitals is firstly a moral concern which not only reflects my own belief that it is wrong to take the life of another human being, but also the belief of the vast majority of the citizens of Saint Louis. This decision against abortions also reflects the practical reasoning that the tax dollars of our citizens could be better spent for programs that will improve our city rather than destroy life.

I am sorry that you are not in agreement with the stand taken by the City of Saint Louis, but I would hope that you can understand the reasoning which prompted this decision.

Kind regards.

Sincerely,

Mayor

jv

Exhibit No. 2

From Mayor John H. Poelker
Room 200 City Hall
453-3201

FOR IMMEDIATE RELEASE: Thursday, May 24, 1973

As a result of my conferences today with Dr. R. Dean Wochner, Director of Health & Hospitals, and Mr. Jack L. Koehr, City Counselor, we have arrived at the following two conclusions:

(1) I have asked the City Counselor to research legal decisions in other states which touch on the question of public responsibility to provide abortions along with other medical services.

(2) I have asked Dr. Wochner to develop, in consultation with his medical staff, a report on what changes would be recommended in the medical staff by-laws in view of the court decisions affecting Missouri's anti-abortion laws. Dr. Wochner, who would have to approve such changes in the medical staff by-laws, will consult with me before any such by-law changes are adopted.

Exhibit No. 3

From Mayor John H. Poelker
Room 200 City Hall
453-3201

FOR IMMEDIATE RELEASE: Thursday, July 26, 1973

Mayor John H. Poelker today announced that he would continue to oppose abortions in municipal hospitals, but at the same time signed into a law a measure setting up standards for privately operated abortion clinics and hospitals.

The Mayor approved a recently passed aldermanic bill (Board Bill 58) which requires private clinics and hospitals to obtain Board of Public Service permits to assure proper sanitary and professional standards for institutions performing abortion services. This action was taken on the recommendation of Dr. R. Dean Wochner, Director of Health and Hospitals.

Also acting upon the recommendation of Dr. Wochner, Mayor Poelker disapproved a second proposal (Board Bill 59) which sought to further regulate clinics and hospitals providing abortion services.

Dr. Wochner in his recommendation for a veto on the second measure said that he agreed with certain provisions of the bill

such as pre-counseling before an abortion and quarterly reports to the Health Commissioner, but he disagreed with the provision of the proposal which permitted abortions to be conducted in clinics up to 17 weeks. Dr. Wochner in a letter to Mayor Poelker said, "It is my opinion that if any procedures are performed after the first trimester (or approximately 12 weeks) they should be performed in a hospital and not in an out-patient facility."

Dr. Wochner also informed the Mayor in his veto recommendation that some of the detailed list of requirements for specific equipment and supplies goes "far beyond what is medically appropriate and comes close to constituting prohibition through regulation."

Mayor Poelker said he had reached the decision to continue to oppose abortions in municipally financed hospitals because: (1) the City Counselor's Office had been unable to find any specific applicable court case which required a public institution to provide abortion services; and (2) because the State Legislature approved, and Governor Bond has signed, a measure which states, "No physician or surgeon, registered nurse, practical nurse, mid-wife or a *hospital, public* or private, shall be required to treat or admit for treatment any woman for the purpose of abortion if such treatment or admission for treatment is contrary to the established policy of, or the moral ethics or religious beliefs of such physician, surgeon, registered nurse, practical nurse, midwife or hospital."

The Mayor said, "Although I have previously, publicly and clearly stated that I am personally opposed to abortion, I believe I have acted responsibly on the basis of the law and the public need. I believe it to be unwise public policy to provide abortion services in our institutions when we are frankly not adequately meeting all the medical requirements of our community in our hospitals because of budget limitations."

Mayor Poelker said that abortions would continue to be performed in city hospital institutions at the physician's discretion when such action was necessary to save the life of the mother.

The Mayor's announcement, in effect, prohibits most abortions in the city's public institutions while on the other hand approves certain medical health and professional standards for private institutions and clinics which may wish to provide such services under the terms of a recently rendered court decision.

Exhibit No. 4

August 28, 1973

Mrs. B. Albrecht
5231 Bancroft Avenue
St. Louis, Missouri

Dear Mrs. Albrecht:

Thank you for your letter. The real issue before the courts would appear to be whether or not we are required by law to use tax dollars to perform abortion service.

It is my opinion that abortion is not only morally wrong, but that the tax dollars of our citizens could be better used for programs that will enhance and improve our city rather than to destroy life.

Again, I very much appreciate your letter of support. You have given me added encouragement to continue in my strong stand against abortion.

Kind regards.

Sincerely

MAYOR

jv

Exhibit No. 5

September 4, 1973

Mrs. Penelope Fiedler
10647 Mentz Hill Acres
Saint Louis, Missouri 63128

Dear Mrs. Fiedler:

Thank you for your very kind words in support of my stand against abortion.

My decision not to allow abortions to be performed in our two city hospitals is a moral concern which reflects not only my own strong belief that it is wrong to take the life of another human being, but the belief of the vast majority of the citizens of Saint Louis as well.

This decision against abortions also reflects the practical reasoning that the tax dollars of our citizens could be better spent for programs that will enhance and improve our city rather than to destroy life.

Again, thank you for your support in this controversial issue. You have given me added encouragement to continue in this strong stand against abortion.

Kind regards.

Sincerely

MAYOR

REM/als

United States District Court
Eastern District of Missouri
Eastern Division

(Title omitted in printing)

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

(Filed October 5, 1973)

Come now plaintiff, Jane Doe, and pursuant to Rule 56 of the Federal Rules of Civil Procedure moves for summary judgment against defendants as prayed in her Complaint, inasmuch as the pleadings heretofore filed and the Affidavit marked "Exhibit A" and attached hereto, show that there are no genuine issues as to any material facts and that plaintiff is entitled to judgment as a matter of law.

FRANK SUSMAN
SUSMAN WILLER & RIMMEL
Attorneys for Plaintiff
705 Olive Street—Suite 1212
St. Louis, Missouri 63101
(314) 621-2030

(Affidavit of service omitted in printing)

Exhibit "A"

AFFIDAVIT OF PLAINTIFF, JANE DOE

Comes now Affiant, Jane Doe, and states that she submits this Affidavit in support of "Plaintiff's Motion for Summary

Judgment" to which it is attached as "Exhibit A" and made a part thereof. Said Affiant further states:

1. She is a citizen of the United States and a resident and taxpayer of the City of St. Louis, Missouri and was so at all times hereinafter mentioned. Plaintiff's true identity is contained in a sealed Affidavit which is in the possession of plaintiff's counsel. Said Affidavit has been prepared to protect plaintiff from undue embarrassment and harassment and is available to the Court at its order and convenience.

2. She resides with her husband and their two children, both of whom are over seven years of age and under sixteen years of age.

3. Her husband is unemployed and faces possible conviction and imprisonment as a result of a recent felony arrest. She and her husband cannot afford the expense of another child and plaintiff's consequential loss of employment. She and her family are in severe financial straits and she is the holder of a City of St. Louis hospital clinic card.

4. Since 1965 she has incurred a minimum of five miscarriages and at the time of filing this cause was pregnant and within the first trimester of said pregnancy.

5. During the month of August, 1973, she on two separate occasions requested an abortion at said Starkloff Memorial Hospital but was refused the same by physicians of the obstetrical staff and employees of said hospital, acting within the course and scope of their position and employment.

6. Said refusals were based upon the stated and admitted policy of said hospitals, as expressed by said physicians; the same being a blanket prohibition against performing abortions.

7. She suffers from cervical, fibroid tumors and polyps, a retroverted uterus and trichomycosis. On both occasions she was advised by said hospital, staff physicians to seek an abortion elsewhere and then to return to said hospital for an hysterectomy, involving the permanent removal of her uterus, oviducts and ovaries, a procedure recommended by said hospital, staff physicians based upon her medical and physical condition.

8. She has been advised by a private physician that the ordinary and routine medical procedure in her situation is to perform the abortion and hysterectomy in one surgical procedure, rather than two separate and distinct procedures, thereby greatly reducing the danger and risk of mortality and morbidity to her.

9. The present and real threat by defendants to implement and to enforce the policy herein challenged deters said plaintiff from receiving medical care in a manner beneficial for her health and safety and in a manner consistent with the highest standards of medical practice.

/s Jane Doe

City of St. Louis }
State of Missouri } ss.

On this 4th day of October, 1973, personally appeared before me, an adult female, who being first duly sworn upon her oath did state that she is the plaintiff in the above encaptioned cause, that the above and foregoing Affidavit and the statements contained therein are true to the best of her knowledge, information and belief and that she executed the same as her free act and deed and in the pseudonym of "Jane Doe."

Subscribed and sworn to before me on the day and year last above written.

Burton W. Newman
Notary Public

My Commission Expires: June 26, 1976.

(Seal)

In the United States District Court for the Eastern District of Missouri, Eastern Division

(Title omitted in printing)

PRELIMINARY MEMORANDUM OF AUTHORITIES
Submitted on Behalf of Plaintiff in Support of Her Motion for Summary Judgment

(Filed October 5, 1973)

In recent years, numerous suits have been filed seeking to compel both public and private hospital institutions to allow and to offer the medical procedures of sterilization and abortion, although the medical institution had adopted policies refusing to provide the same. The factual and legal context of the sterilization cases is totally analogous to those involving abortion.

Cases requiring hospitals to provide sterilizations include *Chrisman v. Sisters of St. Joseph* (Civil No. 70-430 [D.Ore. July 22, 1972]); *Taylor v. St. Vincents Hospital* (Civil No. 1090 [D.Mont. Oct. 27, 1972]); *McCabe v. Nassau County Medical Center*, 453 F.2d 698 (2nd Cir. 1971), and *Hathaway v. Worcester City Hospital*, 475 F.2d 701 (1st Cir. 1973). As so aptly noted in *Hathaway, supra*, at page 706,

> "The state interests, recognized by *Roe* as legitimate, are far less compelling in this context. Whatever interest the state might assert in preserving the possibility of future fetuses cannot rival its interest in preserving an actual fetus, which was found sufficiently compelling to outweigh the woman's interest only at the point of viability. The state maintains of course a significant interest in protecting the health and life of the mother who, as here, cares for others whom the state might otherwise be compelled to provide for. Yet whatever health regulations might be appropriate to vindicate that interest, and on the present record we need not decide the issue, it is clear under Roe and Doe (410 U.S. 113 [1973] and 410 U.S. 179 [1973]) that a complete ban on a surgical procedure relating to the fundamental interest in the pregnancy decision is far too broad when other comparable surgical procedures are performed." (Parentheses supplied).
>
> . . .
>
> "In so holding, we are not mandating the city or state to maintain this hospital, or to retain its present size, staff or facilities. The hospital is not required to perform all kinds of non-therapeutic or even all therapeutic surgical procedures. We are merely saying, consistent with the Supreme Court's reasoning in *Shapiro* with regard to welfare payments, that once the state has undertaken to provide general short-term hospital care, as here, it may not constitutionally draw the line at medically indistinguishable surgical procedures that impinge on fundamental rights."

Similarly, in cases directly on point requiring public hospitals to offer abortions the federal courts have had little difficulty in requiring the same. *Doe v. General Hospital of District of Columbia*, 313 F.Supp. 1170 (D.D.C. 1970), *affirmed*, 434 F.

2d 423 (D.C.C. 1970), and 434 F.2d 427 (D.C.C. 1970), and *Nyberg v. The City of Virginia*, — F.Supp. — (D.Minn. Aug. 9, 1973). In *Nyberg, supra*, Judge Neville succinctly ordered,

> "Resolution No. 2606 (prohibiting abortions in the city's public hospital) takes no consideration of the separate trimesters of the pregnancy period and is devoid of any apparent awareness of the varying degrees to which public interests may be imposed upon a pregnant woman in opposition to her private interests. There can be no other conclusion but that Resolution No. 2606 flies directly in the face of the holdings in *Roe v. Wade* and *Doe v. Bolton, supra*, and it therefore must be declared null and void.
>
> The administrators of the hospital will not be ordered to set up procedures to provide abortion services solely upon the demand of a pregnant woman without an accompanying doctor's request. That situation is not contemplated in either *Wade* 410 U.S. at 153 or *Bolton* 410 U.S. at 189. Neither will the court impose its lay opinion upon the hospital administrators by setting out specific and detailed procedures by which abortion services will be provided. Rather, medical techniques are best left to those who are professionally trained. However, the court does not merely strike down Resolution No. 2606, but requires the hospital administrators to take positive steps within a period of 30 days from date hereof to provide abortion services and facilities to licensed physicians in keeping with the rule quoted above.
>
> The court does not purport to require individuals to participate in the providing of abortion services in contravention of their religious or moral convictions. The relief granted goes only so far as to require that facilities at this public institution be provided for abortion services for those doctors and their women patients who have a right to them and request them." (Parentheses supplied).

The present issue is ripe for summary judgment, inasmuch as plaintiff has alleged the unconstitutionality of a policy by defendants, admitted by them in paragraphs 10, 11 and 12 of their "Joint Answer".

FRANK SUSMAN
SUSMAN WILLER & RIMMEL
Attorneys for Plaintiff
705 Olive Street—Suite 1212
St. Louis, Missouri 63101
(314) 621-2030

(Affidavit of service omitted in printing)

In the United States District Court
Eastern District of Missouri
Eastern Division

(Title omitted in printing)

ANSWERS TO INTERROGATORIES

(Filed October 10, 1973)

Comes now, R. Dean Wochner, M.D., Director of Department of Health and Hospitals, and Acting Hospital Commissioner, of the City of St. Louis, Missouri, and makes his answers to written interrogatories served with the Complaint and Summons on August 28, 1973.

Respective of the designations identifying the plaintiff's questions, I answer stating as follows, to wit:

1. City Hospital rules and regulations exemplified by "by-laws;"

a)

i) Max C. Starkloff Hospital; adopted March 1972;

ii) Homer G. Phillips Hospital; adopted April 29, 1968, and revised May 26, 1971.

b)

i) Max C. Starkloff Hospital:

"Part II—Rules and Regulations

"E. General Rules Regarding Abortions and Sterilizations

"If an operation to accomplish sterilization is recommended by the physician for medical indications, the recorded opinion of a knowledgeable consultant should be obtained.

"If sterilization is requested by the patient and the physician agrees, consultation is not necessary.

"A valid permission for sterilization procedure for a married patient requires the written consent of the spouse when available.

"Whenever the married patient claims dissertion or for reasons of mental incompetency a notarized affidavit will be submitted in lieu of the spouse's written consent.

"In all cases where sterilization is performed primarily or results from an indicated operation, it is important that the patient understand that restoration of fertility is unlikely.

"Therapeutic abortion (the removal with legal justification of the human fetus from its mother prior to viability) will be performed only for medical reasons or indications.

"Prior to the performance of a therapeutic abortion, two consultants must agree in writing that the medical indications justify such procedure."

c) The legal authority adopting such hospital rules is the Hospital Commissioner in office at the time of adoption. The rule or rules are usually developed by the medical staff of the respective hospital and submitted to the Hospital Commissioner for his consideration. Herbert R. Domke, M.D., was Acting Hospital Commissioner from August 24, 1966, to January 9, 1971; and R. Dean Wochner, M.D., was appointed Acting Hospital Commissioner on January 10, 1971, and has held such office to the present. The foregoing set out rules are referable to the times these Hospital Commissioners (Acting) held office.

d) Each person of the whole medical staff is obligated to obey such rules; specification of each person would involve the names and addresses of a great number of persons. (Same will be supplied if desired.)

2. None.

3. The technical competence and supporting facilities to perform the medical procedure of abortion exist at both of the City's general hospitals. However, the determination of whether the hospitals ought to or could perform abortions for the general public would depend upon a multiplicity of medical administrative factors, some known and others unknown, such as: the number to be performed: the period in the pregnancy term the operations would be performed; the complicating other physical ailments of the patients; the medical complications resulting from the abortion itself; the extent of the redeployment of the personnel and facilities for performance of abortions and the resulting effect on other services; the additional budgetary factors; and provision for and application of psychiatry services would have to be accommodated.

4. Yes.

5. a) Mayor A. J. Cervantes; Mayor John H. Poelker; each at the time was Mayor of the City of St. Louis and had the address of that office. Mayor Poelker presently occupies such office.

b)

i) Mayor Cervantes

On February 23, 1973, the news media gave very prominent treatment to certain comments of mine regarding the relation of the United States Supreme Court decisions relating to abortion. On February 24, 1973, I received a letter from Mayor Cervantes. A true copy of such letter is hereto attached as a part of this document, identified as Exhibit 1, and is intended as part of my answer to this question.

ii) Mayor Poelker

On May 19, 1973, Mayor Poelker, understanding from news media reports of the day prior that I was about to institute performance of non-therapeutic abortions in the City's hospitals, called me on the telephone at my office and made clear to me that non-therapeutic abortions were not to be performed in the City's hospitals. I cannot recall the Mayor's exact words but they occurred within the context of the legal implications of a decision of the United States District Court in Kansas City the day before.

On May 24, 1973, I attended a meeting with the Mayor at his office between us and the City Counselor, Honorable Jack L. Koehr. This meeting was called to clarify the legal situation regarding abortions in Missouri and the City's legal rights and obligations regarding the same in its hospitals. During the course

of the discussions the Mayor again made clear through words I cannot now recall that I was not to offer non-therapeutic abortions in the City's hospitals.

On July 18, 1973, the Mayor again convened a meeting in his office between we three participants of the May 24, 1973, meeting. The specific occasion for the meeting was to consider and advise the Mayor regarding two Board of Aldermen bills relating to abortions. The Mayor was considering the merits of approval or disapproval of these bills. During the course of our discussions the Mayor again reiterated his opposition to the performance of non-therapeutic abortions in the City's hospitals.

c) The times and place of the Mayors' orders or directives to me is included in my answers to subparagraph "b)" of this question "5."

6. Yes.

7. a) I have repeatedly related the sense of the two Mayors' remarks to me to the medical professional and administrative officers of the City's hospitals and laboratories. This would occur when we were assembled at meetings of the "medical cabinet" composed of the persons occupying the offices hereafter detailed in *Exhibit No. 2*. One specific occasion was on July 30, 1973, when I wrote a letter to Dr. L. V. Mulligan, Medical Director of City Hospital (i.e., Max C. Starkloff Hospital). The full text of the letter and the subject matter is best gathered from a true copy of my letter and its attachment set out as *Exhibit No. 3* of these answers.

b) I cannot recall the exact wording of my statements; however, my answer to question "7, a)" above gives the fair and truthful sense of each of my statements to all of my subordinates

on any occasion when I discussed the subject with them. The context is likewise fairly disclosed by such answer.

c) See Exhibit No. 2.

d) The Mayors as set out foregoing and no other person.

/s/ R. Dean Wochner, M.D.

State of Missouri }
City of St. Louis } ss.

Before me, on this 10th day of October, 1973, R. Dean Wochner, M.D., of lawful age, being first duly sworn, upon his oath, did say that he is the Director of Department of Health and Hospitals, and Acting Hospital Commissioner, of the City of St. Louis, Missouri, and a defendant in the above-styled case to which the foregoing instrument relates, and he did further state that his answers in such instrument are true to the best of his knowledge, information and belief.

Subscribed and sworn to before me, this 10th day of October, 1973.

John J. Fitz Gibbon
Notary Public

My Commission Expires July 10, 1974.

Exhibit No. 1

Office of the Mayor/City of Saint Louis, Missouri
Alfonso J. Cervantes, Mayor

February 24, 1973

R. Dean Wochner, M.D.
Director of Health and Hospitals
1625 South 14th Street
Saint Louis, Missouri 63104

Dear Dr. Wochner:

I am hereby issuing to you as the Director of Health and Hospitals in the City of Saint Louis, an Executive Order to suspend all plans to provide Abortion Services, as described in your announcement of yesterday.

Until such time that it is determined by our Law Department, in consultation with the U.S. District Attorney's Office, the precise effect of the United States Supreme Court ruling on the operations of public hospitals, we will not provide new services for abortions in our hospitals.

I would ask that you contact the law Department Monday, and provide them with information that you might have that would assist them.

Sincerely

/s/ A. J. Cervantes
Mayor

Exhibit No. 2

City of Saint Louis
Department of Health and Hospitals
Office of the Director
1625 South 14th Street ● St. Louis, Missouri 63104

John H. Poelker
Mayor

R. Dean Wochner, M.D.
Director

Departmental Cabinet:

Dr. Louis Alvarez —Snodgrass Laboratory
1606 Grattan Avenue

Dr. Helen Bruce —Room 3, Municipal Courts Bldg.

Dr. Bernard Friedman —Koch Hospital
Koch, Missouri

Dr. Valgard Jonsson —Room 3
Municipal Courts Bldg.

Dr. Virginia Larsen —Chronic Hospital
5700 Arsenal Street

Dr. Manuel Menendez —Homer G. Phillips Laboratory
2601 North Whittier

Dr. Eugene Mitchell —Homer G. Phillips Hospital
2601 North Whittier

Dr. Leo Mulligan —Home: 665 South Skinker Blvd.
St. Louis, Mo. 63105

Mr. John Noble —Homer G. Phillips Hospital
2601 North Whittier

Mr. John O'Shaughnessy—Chronic Hospital
5700 Arsenal Street

Mr. Lambert Padberg —Hospital Commissioner's Office
1625 South Fourteenth Street

Mr. Thomas Purcell —Koch Hospital—Koch, Missouri

Mr. James Sullivan —St. Louis City Hospital
1515 Lafayette Avenue

Exhibit No. 3

July 30 1973

Memo to: Dr. L. V. Mulligan
Medical Director
City Hospital

From: R. Dean Wochner,M. D.
Director of Health and Hospitals

Re: Approval of Staff By-Laws

This is to indicate my approval of the changes in the by-laws of the St. Louis City Hospital Medical Staff which were adopted on June 25, 1973. These changes consisted of deletion of reference to abortions in the previous set of by-laws rules and regulations, in keeping with recent court decisions.

As you know, however, Mayor Poelker has directed that he does not want abortions to be performed in the public hospitals "except when it is deemed necessary to save the life of the mother". I am continuing to discuss this matter with the Mayor in an effort to define a limited set of expanded circumstances under which abortions might be performed I am particularly concerned about the situations in which the mother's health is threatened by the pregnancy, but in which the physician cannot

be certain that life itself is in jeopardy. I shall keep you informed of any further developments.

RDW:gp

cc—Dr. Gaetano Bazzano, President
Medical Staff

Enclosure—Approved Minutes of 6/25 meeting

D. *General Rules Regarding Surgical Care* (Cont.)

1. Except in severe emergencies, the preoperative diagnosis and required laboratory tests must be recorded on the patient's medical record prior to any surgical procedure. If not recorded, the operation shall be cancelled. In any emergency the practitioner shall make at least a comprehensive note regarding the patient's condition prior to induction of anesthesia and start of surgery.

2. A patient admitted for dental or podiatric care is a dual responsibility of the dentist or podiatrist and a physician member of the medical staff.

3. Written, signed, informed, surgical consent shall be obtained prior to the operative procedure except in those situations wherein the patient's life is in jeopardy and suitable signatures cannot be obtained due to the condition of the patient. In emergencies involving a minor or unconscious patient in which consent for surgery cannot be immediately obtained from parents, guardian or next of kin, these circumstances should be fully explained on the patient's medical record. A consultation in such instances may be desirable before the emergency operative procedure is undertaken if time permits.

4. The anesthetist shall maintain a complete anesthesia record to include evidence of pre-anesthetic evaluation and post-anesthetic follow-up of the patient's condition.

5. In any surgical procedure with unusual hazard to life there must be a qualified physician present and scrubbed.

6. All specimens removed at the operation shall be sent to the hospital pathologist who shall make such examination as he may consider necessary to arrive at a tissue diagnosis. His authenticated report shall be made a part of the patient's medical record.

E. *General Rules Regarding Abortions and Sterilizations*

If an operation to accomplish sterilization is recommended by the physician for medical indications, the recorded opinion of a knowledgeable consultant should be obtained.

If sterilization is requested by the patient and the physician agrees, consultation is not necessary.

A valid permission for a sterilization procedure for a married patient requires the written consent of the spouse when available.

Whenever the married patient claims dissertion or for reasons of mental incompetency a notorized affidavit will be submitted in lieu of the spouse's written consent.

In all cases where sterilization is performed primarily or results from an indicated operation, it is important that the patient understand that restoration of fertility is unlikely.

Memorandum and Order of District Court filed January 13, 1975, is printed in the petition for certiorari at pp. A-19-A-26.

Memorandum and order of District Court allowing no attorney's fees filed August 8, 1975, is printed in the petition for certiorari at pages A-56-A-59.

Order filed August 8, 1975, that prohibiting abortions is unconstitutional, etc., is printed in the petition for certiorari at page A-55.

In the United States Court of Appeals
for the Eighth Circuit

Jane Doe, Appellant-Plaintiff, vs. John H. Poelker, Mayor of the City of St. Louis, Missouri, and R. Dean Wochner, M.D., Director of the Department of Health and Hospitals and Acting Hospital Commissioner of the City of St. Louis, Missouri, Appellees-Defendants.	No. 74-1232

I. Motion for Special Orders to Preserve, Guarantee and Effectuate Appellees' Rights to Fair Hearing and Due Process of Law

(Filed April 8, 1974)

Come now Appellees and respectfully move this Honorable Court for special orders pursuant to Rule 2, of Appellate Procedure, or otherwise through the power of the Court, efficient to

protect Appellees' rights against having matters and things decided upon appeal against them upon a record of the District Court in a state of incompletion as to some matters foreign to the basis for judgment of the District Court due to the Appellees' legal and actual inability to learn of the truth of such matters and contest them because of the acts of the Appellant and the manner of disposition by the District Court. As grounds for such orders the Court is respectfully advised of the following, to wit:

1. The *Complaint* in this case, filed on August 17, 1973, failed to disclose the identity of the plaintiff (here Appellant) or any other significant allegation of fact or circumstance from which Defendants (e.g., here Appellees) could make discovery as to the claims made by Plaintiff. Such failure was alleged by Plaintiff's attorneys to be deliberate and intentional at paragraph 4, page 2 of the *Complaint*. (Copy of *Complaint* attached hereto as: *Appellees' Motion I, Exhibit No. 1.*)

2. On August 22, 1973, *unknown* to the Appellees (or the District Court), Appellant was aborted (per admission).

3. Appellees, on September 21, 1973, did state and inform the District Court, by motion and suggestions, of Defendants inability to learn any material fact or matters about the Plaintiff or the circumstances alleged in the *Complaint*, and as a result thereof were precluded from making informed pleading response, preparation for trial, or to defend themselves upon trial, or thereafter. (Copy of *Defendants' Joint Motion for Order Disclosing Identity of Plaintiff and Submission to Discovery*, attached hereto as: *Appellees' Motion I, Exhibit No. 2, A;* and copy of *Suggestions in Support of Defendants' Joint Motion for Order Disclosing Identity of Plaintiff and Submission to Discovery*, attached hereto as *Appellees' Motion I, Exhibit No. 2, B.*)

4. On September 21, 1973, Appellees did state and advise the District Court by motion and suggestions of the absence of

necessary and indispensable parties required to defend certain positive and common law of the State of Missouri in opposition to the claims of the *Complaint*, which were to be, and were, set up in the contemporaneously filed *Defendants' Joint Answer*. (Copy of *Defendants' Joint Motion for Order on Plaintiff to Join Necessary and Indispensable Parties*, attached hereto as: *Appellees' Motion I Exhibit No. 3, A;* and copy of *Memorandum in Support of Defendants' Motion to Order Joinder*, attached hereto as: *Appellees' Motion I, Exhibit No. 3, B.*)

5. On September 21, 1973, Appellees did make and file in the District Court their *Defendants' Joint Answer*, making such admissions and denials as their, plaintiff caused, limited knowledge permitted, and did further set up said defenses based upon existent Missouri law. (Copy of *Defendants' Joint Answer* attached hereto as: *Appellees' Motion I, Exhibit No. 4.*)

6. On October 5, 1973, Appellant did file a motion for summary judgment claiming that "no genuine issues as to any material facts" existed and attached an *affidavit* of Appellant in support essentially reciting the matters, without particularizing detail, claimed in the *Complaint* and without traversing any defenses of the *Answer*, and swearing to the following:

> 9. The present and real threat by defendants to implement and enforce the policy herein challenged deters said plaintiff from receiving medical care in a manner beneficial for her health and safety and in a manner consistent with the highest standards of medical practice.

The jurat to the foregoing affidavit (including paragraph 9 quoted) was affixed on October 4, 1973, attesting to the fact that the Appellant (i.e., "Plaintiff") swore to the truth of the stated matters as of such date. (Copy of *Plaintiff's Motion for Summary Judgment* attached hereto as: *Appellees' Motion I, Exhibit 5, A*; and copy of *Affidavit of Plaintiff, Jane Doe*, attached hereto as: *Appellees' Motion I, Exhibit 5, B.*) Further,

the said jurat was made by a "Burton W. Newman" and a Burton W. Newman is an attorney of record for appellant in this case. (See: *Complaint, Answer* and affidavit jurat.)

7. That at the time of the filing of the aforesaid affidavit (*Appellees' Motion I, Exhibit No. 5, B*) the Appellees had no specific knowledge of, about, or concerning the allegations of the *Complaint* (formally denied by *Answer*) or of the affidavit of Jane Doe, and through the failure and refusal of the attorneys for Jane Doe to disclose the identity of Doe or other significant factual matters so as to permit ordinary discovery concerning her claims, and due to the *pendency* of the Appellees' motion to compel disclosure and permit discovery, Appellees were without lawful means to learn of the truth or falsity of any alleged facts represented to the Court of, about, or concerning Appellant, and were thus and thereby deprived, prohibited and foreclosed from receiving a fair hearing and just determination of the Appellant's motion for summary judgment which the Court did not rule upon and at this time has done no legal injury to Appellees.

8. Appellees, in opposition to Appellant's motion for summary judgment, timely filed with the District Court a memorandum of suggestions in opposition to such Appellant's motion, pointing out the existence of material factual issues and the unfairness and impossibility due to the aforesaid existing situation with regard to making any factual counter proof in opposition to the motion for summary judgment. (Copy of *Defendants' Memorandum in Opposition to Motion for Summary Judgment* attached hereto as: *Appellees' Motion I, Exhibit No. 6.*)

9. At the time of the filing of Appellant's motion for summary judgment, the affidavit thereto attached, taken in consideration of all the other pleadings and suggestions of the Appellant (e.g., see prayer for injunction of *Complaint*) had the reasonable and most probable effect of misleading the District Court as to material facts of the case, and did so mislead the Appellees, in that the reasonable and fair intendment of the affidavit (absent

other knowledge) was that the Appellant was at the date of October 5, 1973, pregnant, and that such pregnancy was then seriously complicated by other related bodily illnesses which required immediate medical attention, and that such purported factual matters were known to and asserted by the Appellant's attorneys of record in the case. Further, at such time (presumably unknown to the Court, and absolutely unknown to the Appellees) Appellant and Appellant's attorneys positively knew (if an admission of February 25, 1974, by Appellant's attorney is accorded credence) that Appellant was not pregnant in that an abortion had been committed on August 22, 1973, on her person and that she did not need or require and was incapable of utilizing the medical services of the City hospitals of the City of St. Louis and for the Court to so order and adjudge that the Appellees cause such medical services to be rendered to Appellant would be a physical impossibility and an objective legal nullity. Appellant's attorneys did nothing to correct or modify the aforesaid false understandings induced in the Court and Appellees as aforesaid.

10. Appellees, being, as aforesaid, totally deprived of and foreclosed from legal means for learning or discovering the truth, and in fact without such knowledge of any of the material facts of and concerning the Appellant and Appellant's allegations, did on February 22, *1974*, learn of statements attributed to Appellant's attorneys (or attorney) in the public news media to the effect that Appellant was not pregnant and had been aborted. As a consequence, Appellees did on February 25, 1974, file a *Motion to Dismiss Plaintiff's Complaint*. (Copy attached hereto as: *Appellees' Motion 1, Exhibit No. 7, A*), together with *Defendants' Suggestions on Question of Plaintiff's Standing to Sue* (copy attached hereto as: *Appellees' Motion 1, Exhibit No. 7, B*), which brought to the Court's notice the said media hearsay information, the then impossibility of Appellees to determine the truth or falsity of the information, and the resulting possibility of the mootness of the case and lack

of standing of the Appellant. Appellees moved the Court for an order requiring Appellant to disclose the truth of the Appellant's condition as to her alleged pregnancy and needs of critical medical attention.

11. On February 25, 1974, Appellant's attorneys directed a letter to His Honor, Roy W. Harper, Judge of the United States District Court presiding over the Division of the District Court in which this cause was then pending, which among other things, disclosed the abortion of Appellant on *August 22, 1973*. Thereafter, the Court sustained Appellees' motion and dismissed Appellant's case on March 22, 1974. (Copy of letter to Judge Harper's *Memorandum and Order* of March 22, 1974, with Exhibit 1 thereof, attached as *Appellees' Motion 1, Exhibit No. 8.*)

12. To the date of the filing of this motion Appellees have been and are presently foreclosed and without legal means unless relieved by this Court, from discovering the truth about the Appellant and Appellant's allegations contained in pleadings and other documents filed in the Courts of the United States and as a consequence have not had a fair trial or due process of law in connection therewith.

13. Rule 27, b, of the *Federal Rules of Civil Procedures*, does not appear to be adequate to protect the rights of Appellees under certain contingencies of decision by this Court, the basis for decision of the District Court, and the unruled upon motion of Appellees for discovery in the District Court.

Wherefore, Appellees respectfully pray that:

1. This Court enter an order limiting the issue on appeal to the question of the standing of the Appellant to sue in the District Court or the mootness of the case only; or

2. In denying the order in 1 (one) next above, to order the Appellant to disclose her identity and residence and submit to

discovery as is provided by the *Federal Rules of Civil Procedure*, according to such special rules as this Court may determine to be reasonable and just to both parties; and to fix times to permit such discovery by Appellees, and to enlarge the record on appeal to include the fruits of such discovery.

Respectfully submitted,

JACK L. KOEHR
City Counselor

EUGENE P. FREEMAN
Deputy City Counselor
Attorneys for Appellees-Defendants
314 City Hall
St. Louis, Missouri 63103

(Affidavit of service omitted in printing)

In the United States Court of Appeals
for the Eighth Circuit

(Title omitted in printing)

Appellant's Reply to Appellees' "Motion for Special Orders to Preserve, Guarantee and Effectuate Appellees' Rights to Fair Hearing and Due Process of Law"

(Filed April 11, 1974)

On April 3, 1974 this Honorable Court, in recognition of the urgency and gravity of the issues inherent in this cause, issued an appropriate order accelerating the appellate procedure.

This brief Reply is filed in response to appellees' "Motion for Special Orders to Preserve, Guarantee and Effectuate Appellees' Rights to Fair Hearing and Due Process of Law", heretofore filed on or about April 8, 1974.

Appellees' said "Motion" is a desperate attempt to delay further and to restrict unduly the appellate process and to foreclose any possibility of an appellate decision relating to the merits in said cause. Said "Motion" blatantly and unwarrantedly accuses appellant's counsel of "misleading the District Court" (para. 9), claims that appellees "have not had a fair trial or due process of law" (para. 12) and seeks to limit the options and jurisdiction of this Honorable Court during appeal.

Appellees have conveniently ignored the real issue at bar, *i.e.*, the unconstitutional policy of appellees, admitted to exist ("Defendants' Joint Answer", paras. 10 and 12) and admitted to be arbitrary in nature ("Answers to Interrogatories" of appellee Wochner, no. 3).

Appellees have also conveniently chosen to ignore the class action nature of the suit. At no time during the District Court proceedings did appellees serve interrogatories upon appellant, seek to take her deposition, nor file any counter-affidavits to "Plaintiff's Motion for Summary Judgment".

Appellees' "Motion" and the inappropriate relief therein sought do not enhance the appellate process nor further an equitable and judicious resolution of the issues at hand.

Wherefore, appellant respectfully prays that appellees' "Motion for Special Orders to Preserve, Guarantee and Effectuate Appellees' Rights to Fair Hearing and Due Process of Law" be overruled forthwith.

FRANK SUSMAN
SUSMAN, SCHERMER, WILLER
& RIMMEL
7733 Forsyth Boulevard, Suite 1100
St. Louis, Missouri 63105
(314) 725-7300
Attorneys for Appellant

(Affiavit of service omitted in printing)

United States Court of Appeals
for the Eighth Circuit

No. 75-1648

Jane Doe, et al.,
Appellants,

v.

John H. Poelker, Mayor of the City of St. Louis, Missouri, and R. Dean Wochner, M.D., Director of the Department of Health and Hospitals and Acting Hospital Commissioner of the City of St. Louis, Missouri,
Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: November 11, 1975

Filed: January 5, 1976

Before Heaney, Webster and Henley, Circuit Judges.

Per Curiam.

On June 2, 1975 a panel of this court filed an amended opinion holding that the plaintiffs in this civil rights case, which was prosecuted as a class action, were entitled to declaratory and injunctive relief. In addition, the court determined that notwithstanding the holding of the Supreme Court in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U. S. 240 (1975), plaintiffs were entitled to an award of an attorney's fee against the defendant, John H. Poelker, Mayor of the City of St. Louis, Missouri. This court fixed a fee of $3500.00 as compensation for the services of plaintiffs' counsel at the appellate level, and

remanded the case to the district court with directions to fix a fee for the services of counsel in that court. *Doe v. Poelker*, 515 F.2d 541 (8th Cir. 1975).[1]

With specific regard to the attorney's fee to be awarded the court said (515 F.2d at 548):

> . . . On remand the district court is directed to determine attorneys' fees and to award them to Doe, together with court costs, against the defendant Poelker for that portion of the case carried on in that court. This should be a fair award based on the guidelines listed in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-719 (5th Cir. 1974).[2]

Pursuant to the mandate of this court, the district court held an evidentiary hearing. It found that $9317.50 would be a reasonable fee for the district court services of plaintiffs' counsel, but on the basis of a statement appearing in the opinion in the *Johnson* case, *supra*, the district court concluded that no fee should be allowed since the plaintiffs were not contractually obligated to pay any fee, fixed or contingent, to their attorney. An order denying plaintiffs' application for a fee was entered. Plaintiffs appeal.

Johnson was an individual and class action brought ultimately by two Negroes under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e; they claimed racial discrimination in employment and sought back pay and injunctive relief. The defendant initially objected to the maintenance of the action as a class suit and also demanded a jury trial on the legal issues pre-

---

[1] *See also Doe v. Poelker*, 497 F.2d 1063 (8th Cir. 1974).

[2] Senior Circuit Judge Van Oosterhout, a member of the panel, dissented from so much of the holding as allowed an attorney's fee at either the appellate or the district court level without a prior find- of bad faith by the district court.

sented by the complaint. The district court upheld the defendant on both points. *Johnson v. Georgia Highway Express, Inc.*, 47 F.R.D. 327 (N.D. Ga. 1968). The Court of Appeals for the Fifth Circuit reversed. *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969). Thereafter, the case was tried on the merits, and the plaintiffs prevailed. They were represented throughout by practicing Georgia lawyers, some of whom at least were connected with the NAACP, and by a New York lawyer also associated with the organization just mentioned. The district court allowed the plaintiffs a substantial attorneys' fee which plaintiffs deemed insufficient, and they appealed.

The Court of appeals was of the opinion that the district court had not spelled out with sufficient clarity the factors which it took into consideration in fixing the fee and remanded the case for reconsideration in the light of twelve specific factors which the appellate court mentioned.

One of those factors was whether counsel were representing the plaintiffs on a contingent rather than a fixed fee basis if, in fact, the parties had made any agreement as to a fee. After quoting from *Clark v. American Marine Corp.*, 320 F.Supp. 709, 711 (E.D. La. 1970), *aff'd*, 437 F.2d 959 (5th Cir. 1971), the court said (488 F.2d at 718):

> . . . In no event, however, should the litigant be awarded a fee greater than he is contractually bound to pay, if indeed the attorneys have contracted as to amount.

On the basis of that language the district court reasoned in the instant case that the obligation of a losing defendant to pay a judicially imposed attorney's fee to a successful plaintiff does not exceed in amount the fee that the plaintiff would be obligated contractually to pay to his lawyer in the absence of any judicial award, and that where the plaintiff's contractual obligation to his lawyer is zero, the defendant's obligation with respect to the court imposed fee is also zero.

We do not think that the language from *Johnson*, quoted above, when read in context and in connection with the opinion of the district court in *Clark v. American Marine Corp., supra*, is fairly susceptible to the construction that the court below evidently placed upon it.

The district court wisely entered his evidentiary findings with respect to a reasonable fee notwithstanding his conclusion that such fees could not be awarded. We accept the district court's determination that in the light of the *Johnson* factors the sum of $9317.50 would be a reasonable fee for the services of plaintiff's counsel in the district court, and we remand the case with directions to the district court to enter an order awarding that amount against the defendant Poelker.

Counsel for plaintiffs asks that we award an additional fee for his services in connection with this appeal. We decline to do so.

Reversed and remanded.

A true copy.

Attest: Robert C. Tucker

Clerk, U. S. Court of Appeals, Eighth Circuit

Supreme Court, U. S.
FILED
OCT 21 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 75-442

JOHN H. POELKER, Mayor of the City of St. Louis, Missouri,
and
R. DEAN WOCHNER, M.D., Director of the Department of Health and Hospitals and Acting Hospital Commissioner of the City of St. Louis, Missouri,
Petitioners,

vs.

JANE DOE, et al.,
Respondents.

RESPONDENTS' BRIEF

"In Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit"

FRANK SUSMAN
SUSMAN, SCHERMER, WILLER & RIMMEL
7733 Forsyth Boulevard—Suite 1100
St. Louis, Missouri 63105
(314) 725-7300
Attorneys for Respondents

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

TABLE OF CONTENTS

	Page
The Questions Presented for Review	1
I. The Merits	1
II. Attorneys' Fees	1
III. Respondents' Standing	1
Statement of the Case	2
A. Chronology of Pleadings	2
B. Chronology of Facts	3
Introduction	7
Argument	8
I. The Appellate Court Correctly and Properly Reversed the District Court's Decision and Awarded Judgment to the Respondents on the Merits	8
A. The Factual Pattern of the Exclusion of Abortions as Medical Procedures Performed Within the Confines of the Public Hospitals of the City of St. Louis, Missouri, Was Clearly Within the Scope of Respondents' Pleadings	8
B. The Merits	11
C. The Fashioning of Appropriate Relief	19
II. The Appellate Court Correctly and Properly Awarded Attorneys' Fees on the Basis of "Bad Faith" to Respondents' Counsel	24
III. The Appellate Court Correctly and Properly Ruled That Respondent Doe Had Standing and the Issue of Standing Is Herein Untimely Raised	28
Conclusion	34
Certificate of Service	35

TABLE OF CITATIONS

Cases

Alyeska Pipeline Service Co. v. Wilderness Society, et al., 421 U.S. 240 (1975) 24, 26

Castro, et al. v. Beecher, et al., 459 F.2d 725 (1st Cir. 1972) 21

Chance, et al. v. The Board of Examiners, et al., 458 F.2d 1167 (2d Cir. 1972) 21

Cisneros, et al. v. Corpus Christi Independent School District, et al., 467 F.2d 142 (5th Cir. 1972), cert. denied, 413 U.S. 920 (1973) 20

Crossen, et al. v. Attorney General of the Commonwealth of Kentucky, 344 F.Supp. 587 (E.D.Ky. 1972) 31, 32

Crossen, et al. v. Breckenridge, etc., et al., 446 F.2d 833 (6th Cir. 1971), vacated and remanded on other grounds, 410 U.S. 950 (1973) 30, 31

Doe, et al. v. Bolton, etc. et al., 410 U.S. 179 (1973) 10, 11, 13, 14, 16, 17, 22, 30, 33

Doe, et al. v. General Hospital of the District of Columbia, et al., 313 F.Supp. 1170 (D.D.C. 1970), affirmed, 434 F.2d 423 (D.C.C. 1970), and affirmed, 434 F.2d 427 (D.C.C. 1970) 15, 25

Doe, et al. v. Hale Hospital, et al., 500 F.2d 144 (1st Cir. 1974), cert. denied, 420 U.S. 907 (1975) 16, 25

Doe, et al. v. Israel, etc., 482 F.2d 157 (1st Cir. 1973) .. 32

Doe v. Mundy, et al., 514 F.2d 1179 (7th Cir. 1975) 16, 23, 25

Doe v. Poelker, etc., et al., 497 F.2d 1063 (8th Cir. 1974) 2

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Gregory v. Litton Systems, Inc., 472 F.2d 631 (9th Cir. 1972) 21

Griggs, et al. v. Duke Power Co., 401 U.S. 424 (1971) ... 21

Griswold, et al. v. Connecticut, 381 U.S. 479 (1965) 13

Hathaway v. Worcester City Hospital, et al., 475 F.2d 701 (1st Cir. 1973), stay denied, 411 U.S. 929 (1973) 14, 16, 32

McCabe v. Nassau County Medical Center, et al., 453 F.2d 698 (2nd Cir. 1971) 15

The Moore Company of Sikeston, Missouri, et al. v. Sid Richardson Carbon & Gasoline Company, 347 F.2d 921 (8th Cir. 1965), cert. denied, 383 U.S. 925 (1966) 33

Nelson, et al. v. Heyne, et al., 491 F.2d 352 (7th Cir. 1974), cert. denied, 417 U.S. 976 (1974) 19

Newman, et al. v. State of Alabama, et al., 349 F.Supp. 278 (M.D. Ala. 1972) 19

Nyberg, et al. v. The City of Virginia, et al., 495 F.2d 1342 (8th Cir. 1974), cert. denied, 419 U.S. 891 (1974) 2, 15, 16, 22, 25

O'Connor v. Donaldson, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975) 19

Orr, et al. v. Koefoot, et al., 377 F.Supp. 673 (D.Neb. 1974) 16, 25

Roe v. Arizona Board of Regents, et al., 534 P.2d 285 (Ariz. Ct.App. 1975) 16, 23, 25

Roe, et al. v. Ferguson, et al., 515 F.2d 279 (6th Cir. 1975) 27

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Roe, et al. v. Wade, etc., 410 U.S. 113 (1973) 10, 11, 13, 14, 16, 17, 18, 22, 30, 32, 33, 34

Santiago v. Colon, et al. (Unreported, D.P.R., No. 74-362, Aug. 6, 1974) 16, 25

Wallace v. Debron Corporation, 494 F.2d 674 (8th Cir. 1974) 21

Welsch, et al. v. Likins, et al., 373 F.Supp. 487 (D.Minn. 1974) 19

Wulff, et al. v. Singleton, etc., 508 F.2d 1211 (8th Cir. 1974) 27

Wyatt, et al. v. Stickney, etc., et al., 344 F.Supp. 373 (M.D.Ala. 1972) 19

Statutes

Missouri Revised Statutes, Section 197.032 23

Other Authorities

Faculty Manual of St. Louis University (Revised September 1968) 6

The Alan Guttmacher Institute, Provisional Estimates of Abortion Need and Services in the Year Following the 1973 Supreme Court Decisions: United States, Each State and Metropolitan Area, New York, 1975 35

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 75-442

JOHN H. POELKER, Mayor of the City of St. Louis, Missouri,
and
R. DEAN WOCHNER, M.D., Director of the Department of Health and Hospitals and Acting Hospital Commissioner of the City of St. Louis, Missouri,
Petitioners,

vs.

JANE DOE, et al.,
Respondents.

RESPONDENTS' BRIEF

"In Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit"

THE QUESTIONS PRESENTED FOR REVIEW

I. Did the Appellate Court Correctly and Properly Decide the Merits in Reversing the District Court's Decision?

II. Did the Appellate Court Correctly and Properly Award Respondents' Attorneys' Fees on the Basis of "Bad Faith"?

III. Did the Appellate Court Correctly and Properly Decide That Respondent Doe Had Standing and Has the Issue of Standing Been Untimely Herein Raised?

STATEMENT OF THE CASE

A. Chronology of Pleadings.

On August 17, 1973 respondents filed in said cause No. 73C565(A) their "Complaint for Declaratory Judgment and Injunctive Relief", seeking to obtain the free and ready availability of abortions within the confines of the St. Louis City public hospitals for women eligible for treatment there.

On March 22, 1974 the District Court entered its "Memorandum and Order" dismissing said cause for lack of respondents' standing necessary to pursue the same, as a result of respondent Doe then no longer being pregnant. "Notice of Appeal" to the Eighth Circuit was duly filed by respondents on March 26, 1974 and the matter briefed and orally argued by both parties. On June 4, 1974 respondents were held to have standing and this cause was "reverse(d) and remand(ed) to the district court for further proceedings consistent with the views expressed in this opinion and in our opinion in Nyberg v. City of Virginia, 495 F.2d 1342 (8th Cir. 1974)." *Doe* v. *Poelker*, etc., et al., 497 F.2d 1063, 1967 (8th Cir. 1974). Rehearing *en banc* was denied on June 27, 1974 and a request for stay was denied by this Honorable Court on July 18, 1974 (Cause No. A-1320).

On remand, a trial was held on November 25, 1974 and on January 13, 1975 the District Court entered its "Order" and "Memorandum and Order" dismissing said cause with prejudice. "Notice of Appeal" to the Eighth Circuit again was duly filed by respondents on January 20, 1975. On April 14, 1975 this cause was reversed upon the merits. The policy of petitioners as to a blanket prohibition against abortions and the staffing policies of the city hospitals were all declared unconstitutional. *Doe*, et al. v. *Poelker*, etc., et al., 515 F.2d 541 (8th Cir. 1975).

Rehearing *en banc* was denied on May 7, 1975 and again denied on June 14, 1975. A request for stay was denied by the Honorable Harry A. Blackman on August 5, 1975 and a similar request for stay was denied by the Honorable Lewis F. Powell, Jr. on August 26, 1975.

Petitioners' writ of certiorari was docketed on September 20, 1975.

B. Chronology of Facts.

Respondent Doe on August 7, 1973 was a resident of St. Louis, Missouri, twenty-six years of age and, although married, had been separated from her husband since February 1, 1974. (R. 62). She had two children at that time, a daughter seven years of age and a son nine years of age. (R. 62). She had no medical insurance coverage (R. 62-63) and held a city hospital clinic card. (R. 65).

Prior to August 7, 1973, her husband had been arrested and charged with a crime. (R. 63). Additionally, she had experienced five prior miscarriages. (R. 63; Pls. Ex. 2).

Jane Doe suspected she was again pregnant in late July of 1973 because of a missed menses. (R. 64). She first visited the gynecological clinic of City Hospital on August 7, 1973. (R. 65). Although she could not recall the name of the "physician" (R. 66), she specifically requested an abortion at the city hospital. (R. 65-66). She was informed that an abortion was not possible because it was contrary to hospital policy. (R. 67). The "physician" referred her instead to the obstetrical clinic at city hospital and an appointment for August 13, 1973 was made. (R. 67).

The "physician" on this first visit of August 17, 1973, was Stephen Pandol, then a third year medical student at St. Louis University. (R. 83). His testimony does not contradict that of Jane Doe. (See, Pls. Ex. 2).

Jane Doe appeared at the appointment made for August 13, 1973, at the obstetrical clinic of City Hospital (R. 67) and spoke with Mr. Gregory Totel, a then third year medical student at St. Louis University. (R. 90). Mr. Totel stated to Jane Doe the positive results of her pregnancy tests (R. 93-94) and she requested an abortion at City Hospital. (R. 94). He found no medical indications for an abortion (R. 91) and such reasons, if existent, would have been "severe diabetes, a patient with a severe heart condition, something of that type." (R. 95). Mr. Totel indicated he had "personal convictions against the performance of abortions." (R. 95). He knew of no one at City Hospital to whom to refer Jane Doe,

> "(s)imply because all the people on our service for one reason or another did not engage in abortions . . . [for either] (p)ersonal or religious [reasons]." (Bracketed material supplied). (R. 97). (See, also, Pls. Ex. 2).

On August 14, 1973, she returned and spoke on that occasion with Dr. William J. Ott, from whom she again requested an abortion. (R. 68). Dr. Ott was then serving as chief resident from St. Louis University to the obstetrical service at City Hospital. (R. 99-100). Dr. Ott, because of his personal beliefs against abortion, even refused to provide her with a written statement as to her state of pregnancy. (R. 102). Jane Doe stated to him her desire for an abortion. (R. 104). Dr. Ott further stated that he had received similar requests from patients desiring abortions at City Hospital and his response to such patients had always been the same. (R. 105-106). Dr. Ott referred respondent Doe to Dr. Ziad Abu Dalu. (R. 102). Dr. Ott's medical opinion was that Jane Doe evidenced "no medical indications for termination of pregnancy" (R. 104); but as he stated, "as the professional theories and education applied to me there are no indications for termination of pregnancy." (R. 109). Lastly, Dr. Ott testified that all medical students at City Hospital are students at St. Louis University. (R. 107).

The last physician seen by Jane Doe was Dr. Ziad Abu Dalu, who was the physician to whom Dr. Ott referred her. (R. 69). She told Dr. Abu Dalu she desired an abortion at City Hospital and he responded it could not be done there. (R. 69, 112, 113). Dr. Abu Dalu saw Jane Doe again on August 15, 1973 and basically the conversation of the prior day was repeated. (R. 71, 72).

Dr. Abu Dalu found no "medical reasons" to justify an abortion for this patient (R. 113) and such reasons would be "(s)evere sickness of the paitent, severe debilitating diseases that might affect the mother's health or jeopardize her life." (R. 120). He further did not refer her to another physician for the abortion "(b)ecause I wouldn't discuss it with any other physician. It's a matter of belief and a privacy between a doctor and a patient and I wouldn't push it to any other physician. It's unethical." (R. 120-121). Dr. Abu Dalu admitted he would refer any other "medical or surgical procedures" which he was "unable or unwilling to perform" to another physician. (R. 122-123).

Jane Doe was aborted on August 22, 1973 at the facilities of Reproductive Health Services, a private medical clinic. (R. 74; Pls. Ex. 4).

There was vague and illusive testimony during trial about an obstetrical-gynecological service at City Hospital operated by Washington University, although contrary to petitioner Wochner's statement that the service is staffed exclusively by St. Louis University. (R. 33). Dr. Frank Ostapowicz, Section Head of the Obstetrics and Gynecological Service at St. Louis University, referred to the same as existing "maybe in name only." (R. 41). Mr. Totel referred to the "theoretical existence" of another staffed service (R. 97), but knew of no physicians associated with the Washington University service. (R. 98). Finally, in the nine months of service spent by Dr. Abu Dalu practicing in the obstetrical-gynecological department of City Hospital, he

saw only physicians "known to (him) to be associated with St. Louis University." (Parenthetical material supplied). (R. 124).

Respondent Doe's medical record indicates confirmed cervical fibroid tumors, polyps, vaginitis, erythema, trichomycosis and an extremely retroverted uterus. (Pls. Ex. 2).

Reverend Robert Brungs, S.J., a Jesuit priest and teacher at St. Louis University identified "plaintiffs' exhibit no. 3" as the existing "Faculty Manual of St. Louis University" (Revised September 1968). The exhibit provides on page 34 as follows,

> "(3) Causes of Termination of Tenured Appointment or of Non-Tenured Contracts During the Contract Period
>
> The University may institute procedures for the termination of tenured appointments or current contracts on the basis of the following causes:
>
> . . .
>
> (e) A grave offense in the discharge of University responsibilities, which is clearly against well-established principles of Catholic morality.[14]

---

[14] It should be noted that the offense must be committed during the discharge of University responsibilities. There is no reference here to the private and personal life of the faculty member. Examples of a grave offense committed in the discharge of University responsibilities would be the encouragement of sexual license in a student organization by its faculty moderator or the performance before students by a member of the Medical Faculty of an operation that, by Catholic standards, is clearly and gravely immoral."

Reverend Brungs testified that "By Catholic standards . . . the performance of an abortion before students by a member of the medical faculty (is) a clearly and gravely immoral act". (R. 58, 59). Dr. Ostapowicz similarly testified (R. 52) and indicated its application to the medical school faculty. (R. 50. "St. Louis

University is a Jesuit institution" (R. 54) and as the District Court noted, "(i)t's certainly admitted St. Louis University is a Catholic institution". (R. 14).

INTRODUCTION

Petitioners' Writ for Certiorari (Pet.) is a last ditch, frenetic effort by them to deny to the indigent women in the City of St. Louis, Missouri, free and ready access to the facilities, personnel and services of the public hospitals for the purposes of abortion.

Petitioners have chosen to ignore the unanimous line of identical public hospital cases previously decided and in so choosing, confess their inability to distinguish the same from the situation at bar.

Petitioners have consistently chosen to attack respondents' counsel in splenetic fashion throughout the course of these proceedings. Within their "Petition" they unwarrantedly and falsely accuse respondents' counsel of intentionally withholding evidence (Pet. 10, 32, 40), of procuring respondent Doe's abortion at their expense (Pet. 12), of trying the case in the news media (Pet. 12), and of filing a false affidavit (Pet. 13, 32, 40). Petitioners further attribute to respondents' counsel motivations which have no basis in fact or reality. (Pet. 15, 31, 32). All of petitioners' emotional and hysterical polemics cannot alter the fundamental constitutional rights of respondents which the Appellate Court has resolutely protected.

ARGUMENT

I

The Appellate Court Correctly and Properly Reversed the District Court's Decision and Awarded Judgment to the Respondents on the Merits.

This is not, as petitioners would have this Honorable Court believe, a question of abortion on demand. (Pet. 23). Not a single abortion has been performed in the St. Louis public hospitals between January 1, 1973 and October 16, 1975. The factors creating this abhorent condition were the expressed policy of petitioner Poelker and the staffing policies of the City Hospitals. Both of these issues were clearly presented, briefed, argued and decided in this cause.

A. **The factual pattern of the exclusion of abortions, as medical procedures performed within the confines of the public hospitals of the City of St. Louis, Missouri, was clearly within the scope of respondents' pleadings.**

Paragraph 3 of respondents' "Complaint for Declaratory Judgment and Injunctive Relief", filed August 17, 1973, succinctly although encompassingly, declared,

> "3. This is an action for a declaratory judgment and permanent injunction against the existence, application, implementation and enforcement of express and implied policies, rules, regulations, procedures and practices barring, thwarting, limiting and infringing upon the utilization of the personnel, facilities and services of the general, public hospitals of the City of St. Louis, Missouri, namely, Starkloff Memorial Hospital located at 1515 Lafayette within the City of St. Louis, Missouri and Homer G. Phillips Hospital located at 2601 Whittier within the City of St. Louis, Missouri, for the performance of abortions."

In no manner did respondents at any time indicate or imply that the entire thrust of their action was to void the unwritten oral statements of petitioner Poelker, directing that abortions not be performed within the public hospital facilities of St. Louis, Missouri unless medical indications necessary to preserve the life of the patient were indicated.

In fact, the evidence at trial was directed in main to the staffing policies at Starkloff Memorial Hospital, as well as to petitioner Poelker's personal fiat. The issue was the non-performance of abortions, not petitioner Poelker's religious views.

It is clear that the District Court in its "Memorandum and Order" managed to sidestep entirely the policy of petitioner Poelker, thereby avoiding any confrontation with and ruling upon said policy. The District Court accomplished this evasion by indirectly finding, although not directly stating, that the policy never applied to respondent Doe but finding, rather, that she was refused an abortion by each and every examining physician or medical student for alternative reasons. 515 F.2d at p. 542. Thus, while relying exclusively upon these alternative reasons for the denial of the abortion to justify its decision, the District Court simultaneously refused to recognize or to accept these declinations made to respondent Doe as a basis of her claims.

The District Court stated repeatedly,

> "THE COURT: We're not dealing with that. You're dealing with a policy. If you think under the pleading in the lawsuit I have that we're going to get into the staffing of those hospitals, you're just wrong. We're dealing here with the policy, and if you think that this Court under the pleadings that you have got here—if you want those things, if

that's what you're trying to accomplish, and that's what I assumed that you were trying to do, you've got another lawsuit. Now, there's testimony in addition to that by one of the people you've got here that one of the sections down there is staffed by Washington University people. Now, you indicated in my office sometime that you wanted to do this. I can tell you in my judgment this lawsuit does not attack the staffing of those hospitals, does not require them to staff them in a particular way. This pertains only to a policy that's laid down by the Mayor of the City." (R. 58).

"THE COURT: There's no need to argue that. We've been down that before. I so indicated in the office that I don't understand them (the pleadings) to be so broad. I didn't understand that's what you even were asking for originally and I, in my judgment, if that's what you're after, that's a different ball game. . . . You're going to have to do that in another lawsuit, in my opinion." (Parenthetical material supplied). (R. 60-61).

Respondents from the beginning, since August 17, 1973, sought to challenge the systematic exclusion of all abortions, the rights to which were guaranteed by *Roe*, et al. v. *Wade*, etc., 410 U.S. 113 (1973) and *Doe*, et al. v. *Bolton*, etc., et al., 410 U.S. 179 (1973); regardless of the specific nature assumed by the various guises of restrictive encumbrances generated by petitioners. A reading of Rule of Civil Procedure No. 8(f) that, "(a)ll pleadings shall be so construed as to do substantial justice" further supports respondents' contention. Petitioners had adequate notice from the pleadings and throughout the course of this cause as to the ultimate relief sought by respondents. Petitioners on no occasion claimed surprise during trial. To have required additional litigation to achieve the result, which is constitutionally demanded herein, would have produced substantial justice for neither party.

As the Appellate Court noted,

"From exchanges which occurred during the trial it appears that the district judge thought the complaint was not broad enough to cover an attack on the staffing of the OB-GYN clinic. We disagree. The complaint specifically mentions 'procedures and practices' which thwart the performance of abortions as being under attack. The manner of staffing a hospital is certainly a 'procedure and practice' of that hospital. And, of course, any complaint must be read in the light of Fed.F.Civ.P. 8(f), which states that '(a)ll pleadings shall be so constructed as to do substantial justice.'"

"The city can hardly complain that it was surprised by the staffing issue in view of the broad wording of the complaint. It certainly knew that the gravamen was an attack on everything the city did which had the effect of keeping abortions from being performed in its hospitals. And when Doe put on evidence relating to staffing, the city did not ask for a continuance or attempt to offer any contrary evidence of its own." 515 F.2d at p. 543 at fn. 4.

B. **The merits.**

Briefly, the merits may be stated as follows. On January 22, 1973 this Honorable Court rendered its historic decisions recognizing the constitutional right of women to terminate pregnancy in consultation with their physician. *Roe, supra* and *Doe, supra*. It is difficult to recall another decision of modern times which has had such a profound and intimate effect upon the lives of so many citizens of our country. Ironically, it was this very right which was invidiously being denied to women, particularly to indigent women, of the City of St. Louis, Missouri.

Although accused of "judicial legislation" by many, this Honorable Court in *Roe, supra*, was explicit and exacting as to what states may and may not do to regulate the area of abortion. This Honorable Court very early in its decision stated,

"The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient. . . . the State retains a definite interest in protecting the woman's own health and safety when an abortion is proposed at a late state of pregnancy." 410 U.S. at p. 150.

This Honorable Court continued,

"As we have intimated above, it is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved." 410 U.S. at p. 159.

"With respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now established medical fact, referred to above at p. 149, that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health." . . .

"This means, on the other hand, that, for the period of pregnancy prior to this 'compelling' point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State." 410 U.S. at p. 163.

Later, this Honorable Court repeated itself so as to make its dictates crystal clear,

"To summarize and to repeat:

. . .

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." 410 U.S. at pp. 164-165.

Petitioners through the admitted, prohibitive policies and practices in regard to abortions, within the publicly, maintained and publicly, financed hospitals of the City of St. Louis, had impermissibly intruded into the decision-making privacy of the indigent woman. This Honorable Court unequivocably denied to the state or those acting in its behalf the right to dictate medical policy and procedure in the constitutionally protected area of abortion, a right the petitioners had blatantly usurped.

Petitioners through their arbitrarily, imposed and continued policies and practices had attempted to dictate to respondent and her class, personal decisions in regard to procreation and sexual mores, retained and guaranteed to them by constitutional mandates. See: *Griswold*, et al. v. *Connecticut*, 381 U.S. 479 (1965); *Eisenstadt*, etc. v. *Baird*, 405 U.S. 438 (1972); *Roe*, *supra;* and *Doe*, *supra*. This flagrant imposition of the moral

values of some upon all was constitutionally impermissible and its continued force and effect was intolerable.

As so aptly noted in *Hathaway* v. *Worcester City Hospital*, et al., 475 F.2d 701 (1st Cir. 1973), *stay denied*, 411 U.S. 929 (1973), the Court of Appeals, in voiding a city hospital policy of forbidding its facilities to be used for sterilization procedures, held,

> "The state interests, recognized by *Roe* as legitimate, are far less compelling in this context. Whatever interest the state might assert in preserving the possibility of future fetuses cannot rival its interest in preserving an actual fetus, which was found sufficiently compelling to outweigh the woman's interest only at the point of viability. The state maintains of course a significant interest in protecting the health and life of the mother who, as here, cares for others whom the state might otherwise be compelled to provide for. Yet whatever health regulations might be appropriate to vindicate that interest, and on the present record we need not decide the issue, it is clear under *Roe* and *Doe* that a complete ban on a surgical procedure relating to the fundamental interest in the pregnancy decision is far too broad when other comparable surgical procedures are performed."
>
> . . .
>
> "*Doe* therefore requires that we hold the hospital's unique ban on sterilization operations violative of the Equal Protection Clause of the Fourteenth Amendment."
>
> "In so holding, we are not mandating the city or state to maintain this hospital, or to retain its present size, staff or facilities. The hospital is not required to perform all kinds of non-therapeutic or even all therapeutic surgical procedures. We are merely saying, consistent with the Supreme Court's reasoning in *Shapiro* with regard to welfare payments that once the state has undertaken to provide general short-term hospital care, as here, it may not constitutionally draw the line at medically indistinguishable surgical procedures that impinge on fundamental rights." 475 F.2d at p. 706. See, also, *McCabe* v. *Nassau County Medical Center*, et al., 453 F.2d 698 (2nd Cir. 1971).

Similarly, is *Doe*, et al. v. *General Hospital of the District of Columbia*, et al., 313 F.Supp. 1170 (D.D.C. 1970), *affirmed*, 434 F.2d 423 (D.C.C. 1970) and *affirmed*, 434 F.2d 427 (D. C.C. 1970), in which the Appellate Court held that public hospitals could not constitutionally deny abortions to women seeking them. In *Nyberg*, et al. v. *The City of Virginia*, et al., 495 F.2d 1342 (8th Cir. 1974), *cert. denied*, 419 U.S. 891 (1974), the Eighth Circuit noted,

> "The resolution prohibits the use of hospital facilities for the performing of any abortion which is not necessary to preserve the life of the mother. Because we find that the resolution unduly restricts what the United States Supreme Court has held to be a fundamental right, we are compelled to hold the resolution unconstitutional." 495 F.2d at p. 1343.
>
> . . .
>
> "The language of Roe v. Wade and Doe v. Bolton expressed the plain view that the abortion decision and its implementation is a fundamental right of personal liberty embraced with the Due Process Clause of the Fourteenth Amendment and is thereby protected from undue infringement by the State. In other words, absent compelling circumstances of state interest, regulation of 'certain fundamental rights,' including abortion is unconstitutional." 495 F.2d at pp. 1344-1345.
>
> . . .

"The trial court here, as did the First Circuit in *Hathaway*, felt required to hold that an outright ban on nontherapeutic abortions (Hathaway dealt with a municipal hospital's ban on sterilization operations) was unconstitutional under the teachings of *Doe* and *Roe*. We agree."

"The record in this case demonstrates no compelling circumstances which would mandate this hospital's abortion restricting rules. Nothing on this record indicates that the performance of abortions will interfere with the normal hospital routine or require further staff and facilities. The ban on all abortions other than those to save the mother's life serves neither the hospital nor the state. Doe v. Bolton, *supra* at 198 . . ."

. . .

"The sweeping hospital resolution in question here cannot withstand the constitutional parameters framed by Doe and Roe. It would be a nonsequitur to say that the abortion decision and its effectuation is an election to be made by the physician and his patient without interference by the state and then allow the state, through its public hospitals, to effectively bar the physician from using state facilities to perform the operation." 495 F.2d at p. 1346.

The validity of a policy, practice, statute or ordinance, which results in the arbitrary exclusion of the medical procedure of abortion from the general field of medical services provided, is patently and constitutionally defective. In addition to *Nyberg* and other cases cited *supra*, the identical question has been similarly and unanimously answered in *Doe*, et al. v. *Hale Hospital*, et al., 500 F.2d 144 (1st Cir. 1974), *cert. denied*, 420 U.S. 907 (1975); *Doe* v. *Mundy*, et al., 514 F.2d 1179 (7th Cir. 1975); *Santiago* v. *Colon*, et al., (Unreported, D.P.R. No. 74-362, Aug. 6, 1974); *Orr*, et al. v. *Koefoot*, et al., 377 F.Supp. 673 (D.Neb. 1974); and *Roe* v. *Arizona Board of Regents*, et al., 534 P.2d 285 (Ariz.Ct.App. 1975).

Respondents did not contend that the staffing of the obstetrical and gynecological department of City Hospital by St. Louis University medical school faculty and students was originally designed to foreclose abortions to patients. Nevertheless, abortions without exception have been excluded partially by reason of physicians' personally held moral or religious beliefs and by reason of requiring a degree of medical justification for abortion, inconsistent with the degree permitted by the United States Supreme Court in *Roe*, *supra*, and *Doe*, *supra*. The pre-January, 1973 effect of such staffing as to an unusually low rate of sterilizations performed can also be statistically demonstrated. It is obvious that since January 22, 1973, petitioners had continued to deal and to play their hand on this issue with a "stacked deck", by perpetuating the staffing policies.

To have permitted this situation to continue would not only have foreclosed the public hospital facilities and barred indigent women from their constitutional rights; but would have served to encourage other public hospital facilities to accomplish similarly through this mode of indirection what they had failed, when attempted, to achieve directly.

One salient fact belies all of petitioners' arguments. Not a single abortion had "been performed at the St. Louis public hospitals since January 1 of 1973 to date". (R. 31). Judicial notice and common knowledge as to the prevalence of abortion dramatically illustrated the scope of the problem.

Petitioner Poelker, Mayor of the City of St. Louis, testified that petitioner Wochner served as his appointee. (R. 3). Prior to and since April 5, 1973, petitioner Poelker, through petitioner Wochner, had enforced the policy that no abortions be performed within the city public hospitals unless "the life of the mother is in danger". (R. 6). One such reason for adoption of the policy by petitioner Poelker was "my own personal conviction that abortion is murder". (R. 10). Both petitioners

Poelker and Wochner testified that the policy was enforced despite the fact that no investigations, studies or surveys were ever made in regard to: the possibility of providing abortions and the cost factors involved (R. 11, 28); the availability of appropriate facilities (R. 12, 28); the availability of trained, experienced or willing personnel (R. 12, 28, 29); the availability of arranging with a private medical facility to handle City Hospital patients (R. 13); or the effect of providing abortions on existing services presently offered (R. 39, 40). But for the directions of petitioner Poelker, petitioner Wochner, Director of Health and Hospitals for the City of St. Louis and Acting Hospital Commissioner for the City of St. Louis (R. 19, 22-23) would have provided abortions within the public hospital facilities. (R. 31).

The public hospital facilities did and do provide prenatal care, postnatal care, childbirth and delivery services, miscarriage treatment, dilitations and curettages (D's and C's), hysterectomies and hysterotomies. (R. 29). Petitioner Wochner further stated that the cost of providing early abortions was less than the cost of providing childbirth services (R. 30, 31).

Respondents contended that the burden in this cause has been misplaced by the District Court. Petitioners had admitted throughout this cause the existence of the policy, the staffing of the obstetrical and gynecological service and the results, as evidenced in the very number of abortions performed. At the very least, the existence of the policies dissuaded significant numbers of indigent women from even seeking or requesting abortions at the public hospital facilities.

This Honorable Court in *Roe, supra,* placed upon petitioners the burden of justifying the arbitrary and capricious infringement, which had been in blanket effect for over two years.

> "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." 410 U.S. at p. 155.

Petitioners never sought to justify their position and, in fact, their testimony set out, *infra,* negates any rational justification. Rather, petitioners sought to avoid any direct confrontation with the merits or with the validity of their actions.

C. **The fashioning of appropriate relief.**

The fashioning by the Appellate Court of appropriate relief, to include a positive duty upon petitioners to make every and all reasonable efforts to obtain willing physicians and, in each and every other manner, to offer the medical, abortion services to women who desire them, consistent with the manner that other similar or corresponding medical services are provided, was not unique. Medical treatment has been mandated under related circumstances to effect compliance with constitutional guarantees. See: *e.g., Wyatt,* et al. v. *Stickney,* etc., et al., 344 F.Supp. 373 (M.D.Ala. 1972); *Newman,* et al. v. *State of Alabama,* et al., 349 F.Supp. 278 (M.D. Ala. 1972); *Welsh,* et al. v. *Likins,* et al., 373 F.Supp. 487 (D.Minn. 1974); *Nelson,* et al. v. *Heyne,* et al., 491 F.2d 352 (7th Cir. 1974), *cert. denied,* 417 U.S. 976 (1974); and *O'Connor* v. *Donaldson,* 95 S.Ct. 2486, 45 L.Ed. 2d 396 (1975).

The fact that the arrangement of staffing the obstetrical-gynecological department by St. Louis University personnel was instituted prior to January 22, 1973 did not excuse its continuation; when the patent and obvious effect was to deny to respondents' class the right to constitutionally, protected medical services. The pre-existing nature of such circumstances has never justified its continuance, after the effective date of laws defining newly created, legal rights or status.

In a school desegregation case, *Cisneros*, et al. v. *Corpus Christi Independent School District*, et al., 467 F.2d 142 (5th Cir. 1972), *cert. denied*, 413 U.S. 920 (1973), the Fifth Circuit Court of Appeals held that the previously accepted concept of neighborhood schools would not justify the continued segregation of Mexican-American students, although they lived in a self-imposed neighborhood, known as the Mexican "corridor", and although the pattern of segregation was not statutorily mandated.

> "(W)e think it clear today beyond peradventure that the contour of unlawful segregation extends beyond statutorily mandated segregation to include the actions and policies of school authorities which deny to students equal protection of the laws . . ." 467 F.2d at p. 147.

Similarly, the contour of the invasion of respondents' rights extends beyond the mere facially void edict of petitioner Poelker; and includes the actions and policies of both petitioners, which have accomplished the total exclusion of all abortion procedures from within the confines of the city's public hospitals. Although *Cisneros, supra*, dealt with racial segregation, its principles are equally applicable to the segregational exclusion imposed in this cause upon the class of respondents desiring to terminate their pregnancies and to receive constitutionally permitted and guaranteed medical services within the public hospitals.

> "We therefore hold that the . . . segregation that exists . . . is unconstitutional—not de facto, not de jure, but unconstitutional." 467 F.2d at p. 149.

The school district in *Cisneros, supra*, had argued that, "in the absence of a malevolent motive, de facto and not de jure segregation exists" but the Appellate Court disposed of this contention by stating, " 'the factor of malevolent motivation is farther from the core of invidiousness that condemns explicit . . . discrimination than are the odious effects produced.' " 467 F.2d at p. 150.

Respondents suggest that the standard by which all of petitioners' "express and implied policies, rules, regulations, procedures and practices barring, thwarting, limiting and infringing upon the utilization of the personnel, facilities and services" ("Complaint", para. 3) of the public hospitals for the performance of abortions should be measured, is no less than that employed to gauge employment discrimination. The form of discrimination exercised herein by petitioners was total, irreparable and arbitrary.

As this Honorable Court stated in the oft-cited *Griggs*, et al. v. *Duke Power Co.*, 401 U.S. 424 (1971), regarding employment policies neutral on their face but discriminatory in practice,

> "(G)ood intent or absence of discriminatory intent does not redeem . . . procedures . . . that operate as 'built-in headwinds' for minority groups . . ." 401 U.S. at p. 432.

The staffing procedures of the city public hospitals may be viewed as analogous to the "disparate effect" cases, premised upon *Griggs, supra*, and which have been widely accepted by various Circuit Courts of Appeals. See *e.g.*: *Wallace* v. *Debron Corporation*, 494 F.2d 674 (8th Cir. 1974); *Gregory* v. *Litton Systems, Inc.*, 472 F.2d 631 (9th Cir. 1972); *Castro*, et al. v. *Beecher*, et al., 459 F.2d 725 (1st Cir. 1972) and *Chance*, et al. v. *The Board of Examiners*, et al., 458 F.2d 1167 (2d Cir. 1972).

In light of the total absence of justification offered by petitioners for the staffing procedures, the validity of the same could not be sustained. The rationale of the then existing situation, as amply demonstrated by both the testimony of petitioner Poelker and of petitioner Wochner, set forth *supra*, not only was less than "compelling", but bordered on the non-existent.

The District Court in its "Memorandum and Order" cited *Roe, supra, Doe, supra,* and the opinion of the Appellate Court in *Nyberg, supra,* to reach its conclusion that,

> "In effect, plaintiff is asking this Court to hold that the City of St. Louis must provide someone to take care of any woman who requests an abortion at one of its hospitals. Such a holding would be clearly contrary to established constitutional principles and this Court will issue no order designed to have such an effect." (A. 25).

With due respect, respondents suggest that the District Court misinterpreted the true meanings of *Roe, Doe* and *Nyberg, supra,* and chose to apply an interpretation far stricter than that intended by this Honorable Court or by the Eighth Circuit, respectively. Respondents suggest that the passages cited by the District Court were mere reaffirmations of this Honorable Court's principle in *Roe, supra,* that,

> "This means, on the other hand, that, for the period of pregnancy prior to this, 'compelling' point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated." 410 U.S. at p. 163.

The right of a hospital not to admit or to treat a patient or any specific patient is only again a reaffirmation of the same principle, more explicitly stated in *Doe, supra,* that,

> "*Roe* v. *Wade, supra,* sets forth our conclusion that a pregnant woman does not have an absolute constitutional right to an abortion on her demand." 410 U.S. at p. 189.

It is one matter to acknowledge the right of medical institutions and medical personnel to make independent, concurring opinions as to the advisability of performing any specific and individual request for an abortion; and, on the other hand, to exaggerate out of proportion that right into the principle that

all abortion requests can be denied in arbitrary fashion by a policy with the inevitable effect of excluding any physician willing to perform a non-therapeutic abortion.

The issue of Missouri Revised Statute, Section 197.032, raised by the District Court in its "Memorandum and Opinion" (A-22) and by petitioners (Pet. 7) was adequately dealt with in *Doe* v. *Mundy,* etc., et al., 514 F.2d 1179, 1182 (7th Cir. 1975), where the Appellate Court stated,

> "First, defendants argue that since the hospital's policy was promulgated under an enabling state statute, the plaintiffs are attempting to enjoin operation of the statute itself without convening of the three-judge court required by 28 U.S.C. § 2281. The statute, Wis. Stat. § 140.42, reads in its relevant part:
>
> > '(1) No hospital shall be required to admit any patient or to allow the use of the hospital facilities for the purpose of performing a sterilization procedure or removing a human embryo or fetus.'
>
> Defendants' argument must fail because plaintiffs do not seek state-wide injunctive relief against the operation of a statute; they seek only to enjoin the enforcement of one hospital's rule. Although the conclusion that the statute is unconstitutional may logically follow from the ruling of the District Court, this result does not mean a three-judge court is required. Our conclusion is supported by McCrimmon v. Daley, 418 F.2d 366, 368-369 (7th Cir. 1969), which held that the granting of injunctive relief against the operation of a city ordinance promulgated under a state enabling statute did not require the convening of a three-judge court.."

Similarly is *Roe* v. *Arizona Board of Regents,* et al., 534 P.2d 285, 288 (Ariz.Ct.App. 1975), and the Appellate Court's discussion of the same issue below at 515 F.2d at pp. 545-546 at fn. 7.

II

The Appellate Court Correctly and Properly Awarded Attorneys' Fees on the Basis of "Bad Faith" to Respondents' Counsel.

Petitioners erroneously claim that the Appellate "Court specifically rejected respondent's suggestion of the alternative ground of bad faith" (Pet. 34). This is simply untrue. The Appellate Court on April 14, 1975, stated,

> "However, in light of our determination that attorneys' fees are to be awarded under the 'private attorney general' theory, we need not and do not decide whether or not the actions of the city underlying this litigation and during the course of it call for application of this second exception." (A-37 at fn. 9).

The question of "bad faith" was reserved and not rejected by the Appellate Court. The Appellate Court had more than ample and uncontroverted evidence on which to base its determination of bad faith, only a minor portion of which it set forth in the record. Manifestly, there is no clear abuse of discretion to justify in any manner the setting aside of such award. The Appellate Court refused to reconsider said award *en banc* on June 14, 1975. The Appellate Court in its assessment of attorneys' fees and costs against only petitioner Poelker, deliberately excluded petitioner Wochner from liability for the same; having determined that "bad faith" had not been displayed by the latter. 515 F.2d at p. 548 at fn. 9.

This Honorable Court in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, et al., 421 U.S. 240 (1975), recognized the clear and specific exception to the general principle therein set forth,

> "Also, a court may assess attorneys' fees for the 'willful disobedience of a court order . . . as part of the fine to

> be levied on the defendant, *Toledo Scale Co.* v. *Computing Sale Co.*, 261 U.S. 399, 426-428 (1923),' *Fleischmann Distilling Corp.* v. *Maier Brewing Co., supra,* at 718; or when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons. . . .' *F. D. Rich Co.*, 417 U.S. at 129 (citing *Vaughan* v. *Atkinson*, 369 U.S. 527 (1962)); cf. *Universal Oil Products Co.* v. *Root Refining Co.*, 328 U.S. 575, 580 (1946). These exceptions are unquestionably assertions of inherent power in the courts to allow attorneys' fees in particular situations, unless forbidden by Congress, . . ." 421 U.S. at pp. 258-259.

Petitioner Poelker was found to have "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." The actions of petitioner Poelker were directly contrary to a host of unanimous and identical, federal court decisions, in two of which this Honorable Court had denied certiorari and one of which arose within the Eighth Circuit. See, *e.g.*: *Doe*, et al. v. *General Hospital of the District of Columbia*, et al., 313 F.Supp. 1170 (D.D.C. 1970), *affirmed*, 434 F.2d 423 (D.C.C. 1970), and *affirmed*, 434 F.2d 427 (D.C.C. 1970); *Nyberg*, et al. v. *The City of Virginia*, et al., 495 F.2d 1342 (8th Cir. 1974), *cert. denied*, 419 U.S. 891 (1974); *Doe*, et al. v. *Hale Hospital*, et al., 500 F.2d 144 (1st Cir. 1974), *cert. denied*, 420 U.S. 907 (1975); *Doe* v. *Mundy*, et al., 514 F.2d 1179 (7th Cir. 1975); *Santiago* v. *Colon*, et al. (Unreported, D.P.R., No. 74-362, Aug. 6, 1974); *Orr*, et al. v. *Koefoot*, et al., 377 F.Supp. 673 (D. Neb. 1974); and *Roe* v. *Arizona Board of Regents*, et al., 534 P.2d 285 (Ariz.Ct.App. 1975).

Petitioner Poelker unequivocally testified at trial that the reason for adoption of his policy was "my own personal conviction that abortion is murder." (R. 10). Petitioner Poelker further testified the policy was enforced despite the fact that no investigations, studies or surveys were ever made as to: the possi-

bility of providing abortions and the cost factors involved (R. 11, 28); the availability of appropriate facilities (R. 12, 28); the availability of trained, experienced or willing personnel (R. 12, 28, 29); the availability of arranging with a private medical facility to handle city hospital patients (R. 13); or the effect of providing abortions on existing services presently offered (R. 39, 40). To restate, but for the directions of petitioner Poelker, petitioner Wochner would have provided abortions within the public hospital facilities. (R. 31).

The Appellate Court aptly noted in its opinion,

> "Nonetheless, we are convinced that an award of attorneys' fees to Doe is proper here under another exception to the rule which was specifically recognized and reiterated in *Alyeska Pipeline*—when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.' Id. — U.S. —, 95 S.Ct. at 1622 (*quoting* F. D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116, 129, 94 S.Ct. 2157, 40 L.Ed. 2d 703 1974)) *See, e.g.*, Fowler v. Schwarzwalder, *supra*, 498 F.2d at 144 (dictum); Bell v. School Board, 321 F.2d 494, 500 (4th Cir. 1963)." 515 F.2d at p. 547.

Respondents suggest that to deny the previously awarded attorneys' fees would critically emasculate the recent judgment of the Appellate Court. The rightful and warranted award of attorneys' fees in this cause has produced an effect upon the officials of St. Louis more sobering than the accompanying judgment or any previous judgment in related abortion actions.

For this Honorable Court to vacate said attorneys' fees at this stage of the proceedings would serve as a green light for petitioner Poelker to continue thwarting in dilatory fashion the judgments of this Honorable Court and the Appellate Court. The utter and total impunity with which petitioner Poelker had operated in the past could only have been checked and effectively

challenged through the proper allowance of attorneys' fees, upon the permitted and warranted basis of "bad faith". Petitioner's conduct, as manifested by the evidence, the record, his statements directly and through his counsel and his actions were amply sufficient for the finding by the Appellate Court.

Petitioners blithely choose to ignore the actual bases for the Appellate Court's said determination of "bad faith" on the part of petitioner Poelker and instead attempt to build arguments based on false premises. Petitioners contend that *Wulff*, et al. v. *Singleton*, etc., 508 F.2d 1211 (8th Cir. 1974) "involved construction of Title XIX of the Social Security Act" and "(n)ot the question of *whether* the Federal or State government were constitutionally required to provide such funds for 'indigent women' ". (Pet. 36). In fact, the *only* question raised by plaintiffs in *Wulff, supra*, was the constitutional issue and the statutory issue of conflict with Title XIX was never raised nor briefed. Petitioners have distorted the holding in *Wulff, supra*, a full one hundred eighty degrees; after which they proceed to cite additionally *Roe*, et al. v. *Ferguson*, et al., 515 F.2d 279 (6th Cir. 1975), which was specifically remanded so that the constitutional issue could be determined, and *Roe*, et al. v. *Norton*, et al., — F.2d — (2nd Cir. 1975), reversing on other grounds, 380 F.Supp. 726 (D. Conn. 1974), which never dealt with the constitutional issue raised in *Wulff, supra*. (Pet. 36-37).

After a thorough analysis of the record and petitioner Poelker's words and actions, the Appellate Court properly concluded that said petitioner had acted in a manner properly characterized as "arbitrary", "obstinately", "intransigent", "wanton", "callous", "oppressive", and "obdurate". 515 F.2d at pp. 546-548.

III

The Appellate Court Correctly and Properly Ruled That Respondent Doe Had Standing and the Issue of Standing Is Herein Untimely Raised.

The issue of respondent Doe's standing in the instant cause was squarely decided in respondents' favor in the opinion of the first appeal of this cause reported at 497 F.2d 1063 (8th Cir. 1974), rehearing denied *en banc* June 27, 1974 and stay denied by this Honorable Court on July 18, 1974 (Cause No. A-1320). Petitioners failed to appeal or to seek a writ of certiorari in timely fashion and the matter is thereby foreclosed at this stage of the proceedings. Supreme Court Rules 11 and 22.

Even assuming the matter may be raised herein more than one year after the appellate decision of the issue, the law as to such standing clearly forecloses petitioners' arguments on the merits.

Respondent Doe was pregnant on August 17, 1973, as alleged in her "Complaint for Declaratory Judgment and Injunctive Relief," para. 7, filed on August 17, 1973 and as verified in her "Affidavit of Plaintiff, Jane Doe," paragraph 4, filed on October 5, 1973. In fact, Respondent Doe on August 17, 1973 was in the last few days of the first trimester of pregnancy. The inability of respondent Doe to obtain an immediate abortion would have foreclosed the possibility of obtaining an out-patient clinical procedure and would have necessitated an in-patient surgical method involving substantially, increased, risk to her.

Respondent Doe readily admitted that she obtained an abortion on August 22, 1973. The mortality and morbidity of abortion increases with every passing day of gestation. The natural reticence of potential plaintiffs in actions of this type, to brave the risk of public disclosure, harassment and censure could not be ignored; particularly since many of those who utilize the public hospital facilities are those least able to afford the financial, energy and time expenses of litigation.

Respondents would direct the attention of his Honorable Court to the recent language in *Roe, supra*, wherein the specific issue as to the effect of a pregnancy's termination on mootness was answered.

> "A. *Jane Roe.* Despite the use of the pseudonym, no suggestion is made that Roe is a fictitious person. For purposes of her case, we accept as true, and as established, her existence; her pregnant state, as of the inception of her suit in March 1970 and as late as May 21 of that year when she filed an alias affidavit with the District Court; and her inability to obtain a legal abortion in Texas."
>
> . . .
>
> "The appellee notes, however, that the record does not disclose that Roe was pregnant at the time of the District Court hearing on May 22, 1970, or on the following June 17 when the court's opinion and judgment were filed. And he suggests that Roe's case must now be moot because she and all other members of her class are no longer subject to any 1970 pregnancy."
>
> "The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated. . . ."
>
> "But when, as here, pregnancy is a significant fact in the litigation, the normal 166-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be

'capable of repetition, yet evading review.' Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911). . . ."

"We, therefore, agree with the District Court that Jane Roe had standing to undertake this litigation, that she presented a justiciable controversy, and that the termination of her 1970 pregnancy has not rendered her case moot." 410 U.S. at pp. 124-125.

Similarly, is *Doe, supra*, decided the same day in which it was noted that the action was filed on April 16, 1970 (410 U.S. at p. 184) and held pregnancy on day of filing to be sufficient, without evidence or notation of pregnancy beyond that date.

"Our decision in *Roe* v. *Wade, ante*, p. 113, establishes (1) that, despite her pseudoym, we may accept as true, for this case, Mary Doe's existence and her pregnant state on April 16, 1970; (2) that the constitutonal issue is substantial; (3) that the interim termination of Doe's and all other Georgia pregnancies in existence in 1970 has not rendered the case moot; and (4) that Doe presents a justiciable controversy and has standing to maintain the action."

". . . Doe and her class are recognized . . ." 410 U.S. at pp. 187-188.

In the District Court's "Memorandum and Order", it specifically noted that,

"This Court recognizes that the pregnancy which gave rise to the present controversy herein has been resolved by the plaintiff's termination of her pregnancy, but that the underlying problem of the blanket policy against abortions in the public hospitals of the City of St. Louis still remains." (A-3)

Cases cited by petitioners simply are not applicable nor analogous. In *Crossen*, et al. v. *Breckenridge*, etc., et al., 446 F.2d

833 (6th Cir. 1971), *vacated and remanded on other grounds*, 410 U.S. 950 (1973), is cited by the petitioners as authority for their position. (Pet. 50). In fact, a close reading of the related *Crossen* case demonstrates the absolute correctness of respondents' position.

"The case was filed by the plaintiffs on May 13, 1970. . . . The plaintiffs, an obstetrician, a minister, a pregnant woman, a woman having the capacity to become pregnant and a women's liberation group, each claimed standing to attack the statute." *Crossen*, et al. v. *Attorney General of the Commonwealth of Kentucky*, 344 F.Supp. 587, 588-589 (E.D. Ky. 1972).

Crossen, supra, had originally been dismissed for lack of standing on October 7, 1970 (see 344 F.Supp. at p. 589), some 147 days after its filing. On June 23, 1971, some 406 days after filing, the Sixth Circuit Court of Appeals reversed and held,

"At the commencement of the action appellant Craddock was pregnant and had allegedly been denied an abortion . . . On these facts we find that appellant Craddock has standing . . ."

. . .

"Appellant Pozzuto, on behalf of herself and all other similarly situated married women, alleges that she is not pregnant but may desire to terminate future pregnancies and would be unable to obtain a medical abortion . . . we hold that appellant Pozzuto does not have standing . . ." *Crossen*, et al. v. *Breckenridge*, etc., et al., 446 F.2d 833, 839 (6th Cir. 1971), *vacated and remanded on other grounds*, 410 U.S. 950 (1973).

On May 19, 1972, some two years and six days after filing of suit, the District Court ruled on the merits of the plaintiffs' claims, including plaintiff Craddock who had been pregnant at

the initial filing of said cause. *Crossen*, et al. v. *Attorney General of the Commonwealth of Kentucky*, 344 F.Supp. 587 (E.D.Ky. 1972).

The First Circuit Court of Appeals has also held that termination of pregnancy during pendency of District Court proceedings does not render the cause moot, even though plaintiffs similarly aborted immediately after filing suit and before trial.

> "First, defendant says that he has a probability of succeeding on the merits because plaintiffs' case is moot due to the fact that after its commencement plaintiffs voluntarily obtained abortions in New York. The fact that a plaintiff had other available relief does not moot the case, Hathaway v. Worcester City Hospital, 1 Cir., 1973, 475 F.2d 701, and defendant does not so claim. Nor, of course, does defendant dispute the basic *Roe* rule that the necessarily short duration of a pregnancy does not, in normal circumstances, create mootness when pregnancy ceases."
>
> . . .
>
> "We consider that defendant's claim of mootness is a will-o'-the-wisp and assumes the very question at issue. If a plaintiff has a right to terminate her pregnancy—which is the legal question before us—the sooner she succeeds in doing so, the better. We have in mind the trimester trilogy, on which defendant relies in another connection, and its effect on viability and the pregnant plaintiff's health. *See* Roe v. Wade, 410 U.S. at 149-150, 93 S.Ct. at 725. It seems not only illogical but, to use a polite word, harsh, to argue that in order to establish her right to an abortion a woman must decline to have it." *Doe*, et al. v. *Israel*, etc., 482 F.2d 157, 158 (1st Cir. 1973).

Petitioners' suggestion that respondent Doe should have borne a child in order to maintain her standing, recalls shades of our

history when innocence of witchcraft was proven by the drowning of the accused.

In this cause the District Court noted that respondent Doe had terminated her pregnancy prior to service on petitioner Wochner. (Pet. 40). The date of service, if diligent, has never been held a critical time reference. Instead, the filing of the action is the relevant consideration of timeliness. See, *The Moore Company of Sikeston, Missouri*, et al. v. *Sid Richardson Carbon & Gasoline Company*, 347 F.2d 921, 922-923 (8th Cir. 1965), *cert. denied*, 383 U.S. 925 (1966). Federal Rule of Civil Procedure No. 3 specifically provides, "A civil action is commenced by filing a complaint with the court".

The language of *Roe, supra*, and *Doe, supra*, as to standing in pregnancy cases is not strictly applicable to only the appellate process. No logical reason exists to so narrowly interpret it nor does reason support such an interpretation. A close reading belies such a meaning or intent. The language is equally applicable to all stages of litigation. To hold otherwise would institute an arbitrary distinction and subject pregnant plaintiffs to the capricious whims, delays and dilatoriness of courts and opposing counsel. It should be noted that respondent Doe was 12 weeks pregnant at time of filing, would have been 19 weeks pregnant at time of filing for summary judgment on October 5, 1973 and would have been 39 weeks pregnant and past her expected date of delivery when the District Court below first learned of her non-pregnant status; having failed in the interim to decide or rule on her motion for summary judgment. (A-3).

As so aptly noted in *Roe, supra*, a normal pregnancy is 38 weeks (410 U.S. at p. 125) and "(m)oreover, the risk to the woman increases as her pregnancy continues". 410 U.S. at p. 150.

How much risk should pregnant plaintiffs be judicially required to endure? How much risk is too much risk? Should

pregnant plaintiffs be required, in order to assure their standing, to assume the ever increasing rates of morbidity and mortality until the date of service on defendants, until defendants file motions, until defendants file an answer, until date of trial, until date of court judgment or until some other as equally arbitrary, indefinite and undeterminable period of time? This Honorable Court noted, it is only during the first trimester that "(m)ortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth." *Roe, supra,* 410 U.S. at p. 149. Petitioners would place respondent Doe and all potential similar plaintiffs between the Scylla of being foreclosed an abortion through the dismissal of her suit and the Charybdis of retaining her standing while increasing the risk to her life.

Petitioners have not cited a single case in which plaintiffs were held not to have standing when pregnant at time of filing. Cases denying standing to women on the basis of only a possible future pregnancy are not analogous nor of the slightest precedential value.

CONCLUSION

The number of pregnant, indigent women in the City of St. Louis, Missouri, who have been irreparably damaged through the denial to them of their fundamental constitutional rights by the actions of petitioners, is staggering. The principles upheld by the Appellate Court in its two prior decisions of this cause have been firmly and unanimously established by all federal courts ruling upon the identical issues. Petitioners have cited not a single case to the contrary.

Petitioners should not be allowed through emotionally laden hysterics nor ill-founded and unmeritorious legal claims to escape the full and fair impact of the Appellate Court's judgments.

At a press conference on October 10, 1975, petitioner Wochner admitted that to date not a single abortion has yet been performed, despite the fact that the number of patient inquiries has been 450% of his recent estimate as to the expected demand. It has been reliably estimated that only 11% of the need for abortion services is presently being met in Missouri and that 53% of the need is among low and marginal income women. THE ALAN GUTTMACHER INSTITUTE, *Provisional Estimates of Abortion Need and Services in the Year Following the 1973 Supreme Court Decisions: United States, Each State and Metropolitan Area,* New York, 1975.

Accordingly, respondents respectfully pray that petitioners' "Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit" be denied forthwith.

Respectfully submitted

FRANK SUSMAN
SUSMAN, SCHERMER, WILLER
& RIMMEL
7733 Forsyth Boulevard—Suite 1100
St. Louis, Missouri 63105
(314) 725-7300
Attorneys for Respondents

Certificate of Service

I, the undersigned attorney for respondents and a member of the bar of the United States Supreme Court, do hereby certify that pursuant to Supreme Court Rule No. 33, I have caused to be served a true and correct copy of the foregoing "Respondents' Brief in Opposition to 'Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit'," upon

each party required to be so served, by depositing said copy in a United States Postal Service mail box, with first class postage prepaid and affixed, addressed to Mr. Jack L. Koehr and to Mr. Eugene P. Freeman, Office of the City Counselor, attorney for petitioners, St. Louis City Hall, Room 314, 1200 Market Street, St. Louis, Missouri 63103.

FRANK SUSMAN
SUSMAN, SCHERMER, WILLER
& RIMMEL
7733 Forsyth Boulevard—Suite 1100
St. Louis, Missouri 63105
(314) 725-7300

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 75-442

JOHN H. POELKER, MAYOR OF THE CITY OF ST. LOUIS, MISSOURI, and R. DEAN WOCHNER, M.D., DIRECTOR OF HEALTH AND HOSPITALS AND ACTING COMMISSIONER OF HOSPITALS OF THE CITY OF ST. LOUIS, MISSOURI,
Petitioners

v.

JANE DOE, AND A CLASS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE PETITIONERS

JACK L. KOEHR
City Counselor of the City of St. Louis, State of Missouri
EUGENE P. FREEMAN
Deputy City Counselor of the City of St. Louis, State of Missouri
Room 314, City Hall
1200 Market Street
St. Louis, Missouri 63103
(314) 453-3366
Attorneys for Petitioners

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Positive Law Provisions Involved	4
Questions Presented for Review	9
Statement of the Case	10
Summary of Argument	25
The Argument	30
Preface	30
I. Abortion on Demand	32
II. Appellate Abuse of Discretion	52
1. Overturning District Court's findings	52
2. Court of Appeals initiation of petitioner Mayor's conviction of "bad-faith and imposition of punishment by levying "attorney fees"	63
III. Justiciability, Standing and Mootness	71
Conclusion	85

TABLE OF AUTHORITIES CITED

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Alyeska Pipeline Service Co. v. Wilderness Society, 421 US 420 (S.Ct. 1975) 59, 63, 70

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Barlow v. Collins, 397 US 159 (S.Ct. 1970) 82
Bellotti v. Baird, — U.S. —, 44 L.W. 5221 (S.Ct. 1976). 30, 48
Birdwell v. Hazelwood School District, 491 F2d 490 (C.A. 8th, 1974) 62

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Crossen v. Breckenridge, 446 F2d 833 (C.A. 6th, 1971). 78, 82

Danforth v. Rodgers, 414 US 1035 (S.Ct. 1973) 65
Dandridge v. Williams, 397 U.S. 471 (S.Ct. 1970) ..37, 47, 48
Doe v. Bolton, 410 US 179 (S.Ct. 1973) 30, 31, 38, 40, 43, 44, 47, 51, 64, 65, 66, 85
Doe v. Rampton, 366 F.Supp. 189 (Utah, three-judge Ct., 1973) 37
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Golden v. Zwickler, 394 US 103 (S.Ct. 1969) 74, 76, 77

Harper v. Virginia State Board of Elections, 383 U.S. 663 (S.Ct. 1966) 49
Hathaway v. Worcester City Hospital, 475 F.2d 701 (C.A. 1st Cir. 1973) 36, 37

Indiana Employment Division v. Burney, 409 US 540 (S. Ct. 1973) 77

Klein v. Nassau County Medical Center, 347 F.Supp. 496 (E.D. N.Y., three-judge Ct., 1972), rev. and rem. 412 US 925 (S.Ct. 1973) 37, 38

Linda R.S. v. Richard D., 410 US 614 (S.Ct. 1973) 77

Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (S.Ct. 1910) 50

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Nyberg v. City of Virginia, 495 F2d 1342 (C.A. 8th Cir. 1974), and cert. den., 419 U.S. 891 (S.Ct. 1974) 34, 35, 38, 42, 66
Nyberg v. City of Virginia, 361 F.Supp. 932 (D.C.D.Min., 1973) 35

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Pendergrass v. New York Life Insurance Co., 181 F2d 136 (C.A. 8th, 1950) 62
Planned Parenthood of Central Missouri v. Danforth, — U.S. —, 44 L.W. 5197 (S.Ct. 1976) 30, 34, 45, 66
Poe v. Menghini, 339 F.Supp. 986 (D. Kan. 1972) 78, 82

Rodgers v. Danforth, 410 US 949 (S.Ct. 1973) 65
Roe v. Ferguson, 515 F2d 279 (C.A. 6th Cir. 1975) 67
Roe v. Norton, 522 F2d 928 (C.A. 2nd Cir. 1975) 68
Roe v. Wade, 410 US 113 (S.Ct. 1973) 30, 31, 34, 36, 38, 40, 43, 44, 47, 51, 64, 65, 66, 68, 76, 78, 81, 82, 83, 84, 85

Shapiro v. Thompson, 394 US 618 (S.Ct. 1969) 37, 47
Skinner v. Oklahoma, 316 US 535 (S. Ct. 1942) 37

Toledo Scale Co. v. Computing Scale Company, 261 US 399 (S.Ct. 1923) 70
Traux v. Raich, 239 US 33 (S.Ct. 1915) 78, 83

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United States v. United States Gypsum Co., 333 US 364 (S.Ct. 1948) 61

Universal Oil Products Co. v. Root Refining Co., 328 US 575 (S.Ct. 1964) 70

Vaughan v. Atkinson, 369 US 527 (S.Ct. 1962) 70

Word v. Poelker, 495 F2d 1349 (C.A. 8th Cir., 1974) ..64, 69

Wulff v. Singleton, 508 F2d 1211 (C.A. 8th Cir. 1974) rev. and rem. — US —, 44 L.W. 5213 38, 61, 64, 66, 67, 68

Young v. American Mini Theatres, Inc., — US — (S.Ct. 1976) 37

Statutes and Court Rules

Charter of the City of St. Louis, Article XVIII, Sections 3 (n), 16, and 22 42

Federal Rules of Civil Procedure, Rule 52(a) 53, 60, 62

Federal Rules of Civil Procedure, Rule 8(f) 61

Revised Statutes of Missouri, Section 197.032, Laws 1973 42

United States Supreme Court Rule 19(b) 53

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 75-442

JOHN H. POELKER, MAYOR OF THE CITY OF ST. LOUIS, MISSOURI, and R. DEAN WOCHNER, M.D., DIRECTOR OF HEALTH AND HOSPITALS AND ACTING COMMISSIONER OF HOSPITALS OF THE CITY OF ST. LOUIS, MISSOURI,
Petitioners

v.

JANE DOE, AND A CLASS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

A. There are four separate "Memoranda and Orders" of the United States District Court, Eastern District, Eastern Division of Missouri, which are not reported. These are:

1. *Jane Doe, et al. v. John H. Poelker, Mayor of the City of St. Louis, Missouri, et al.*, Case No. 73-C-565 (A), entered on March 22, 1974;[1]
2. *Jane Doe, et al. v. John H. Poelker, Mayor of the City of St. Louis, Missouri, et al.*, Case No. 73-C-565 (A), entered on January 13, 1975;[1]

[1] Included in printed Petn. for Cert. Appendix.

3. *Jane Doe, et al. v. John H. Poelker, Mayor of the City of St. Louis, Missouri, et al.*, Case No. 73-C-565 (A), entered on August 8, 1975;[2] and
4. *Jane Doe, et al. v. John H. Poelker, Mayor of the City of St. Louis, Missouri, et al.*, Case No. 73-C-565 (A), entered on January 27, 1976.[3]

B. There is an opinion of the Court of Appeals for the Eighth Circuit entered on June 4, 1974, in Case No. 74-1232, reversing and remanding to the District Court in A-1 above, reported officially as *Jane Doe, et al. v. John H. Poelker, etc., et al.*, 497 F.2d 1063.[2]

C. There is an opinion of the Court of Appeals for the Eighth Circuit filed April 14, 1975, in Case No. 75-1069, reversing and remanding to the District Court in A-2 above; thereafter before the mandate, there are also two substantial modifications of this opinion by orders entered on May 7, 1975, and June 2, 1975, with Senior Circuit Judge Van Oosterhout concurring in part and dissenting in part.[2] The case is reported officially as *Jane Doe, et al. v. John H. Poelker, etc., et al.*, 515 F.2d 541, as the opinion finally evolved after the aforesaid modifications.

D. There is an opinion of the Court of Appeals for the Eighth Circuit filed January 5, 1976, in Case No. 75-1648, reversing and remanding to the District Court in A-3 above. The case, styled *Jane Doe, et al. v. John H. Poelker, etc., et al.*, is officially reported as *Jane Doe, et al. v. John H. Poelker, etc., et al.*, 527 F.2d 605 (C.A. 8th C. 1976).

JURISDICTION

A final judgment dated and entered by the Court of Appeals on April 14, 1975, is sought to be reviewed.

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[2] Included in printed Petn. for Cert. Appendix.

[3] Set out in full in single Appendix.

The Court of Appeals entered an interlocutory judgment reversing a judgment of the District Court and remanding the case for trial on June 4, 1974. Timely petitions for rehearing and rehearing *en banc* were denied by the Court of Appeals' order made on June 27, 1974.

A final judgment of the Court of Appeals, reversing the District Court and remanding for limited purposes was dated and filed on April 14, 1975. Timely petitions for rehearing and rehearing *en banc* were denied by the Court of Appeals' order of May 7, 1975; and such order, in response to said petitions, substantially modified the opinion and judgment of April 14, 1975. Upon petitioners' timely motion for further amendment of the opinion and judgment as modified, the Court of Appeals again substantially modified its opinion and judgment on June 2, 1975, and granted petitioners the right to file second petitions for rehearing and rehearing *en banc*. Timely second petitions for rehearing and rehearing *en banc* were filed and denied by the Court of Appeals' order entered on June 24, 1975. The litigation continued in the District Court pursuant to the appellate mandates, and a final limited issue appeal (C.A., 8th C., No. 75-1648; Jan. 5, 1976; 527 F.2d 605) followed adverse to petitioners.

A petition for the issuance of a writ of certiorari was filed by the petitioners and docketed on September 20, 1975, as No. 75-442 in this Honorable Court, within 90 days as required by law. Such petition was granted by the Court on July 6, 1976. The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

POSITIVE LAW PROVISIONS INVOLVED

The Constitution of the United States

Article III:

Section 1. The Judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls; —to all Cases of admiralty and maritime jurisdiction;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Land under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Amendments to the United States Constitution:

First Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment, providing in applicable part:

* * * nor be deprived of life, liberty, or property, without due process of law;

Seventh Amendment:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Ninth Amendment:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Tenth Amendment:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Fourteenth Amendment:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Constitution of the State of Missouri, 1945

Article I, Bill of Rights:

In order to assert our rights, acknowledge our duties, and proclaim the principles on which our government is founded, we declare:

* * * * * * *

Section 2. Promotion of general welfare—natural rights of persons—equality under the law—purpose of government. That all constitutional government is intended to promote the general welfare of the people; that all persons have a natural right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry; that all persons are created equal and are entitled to equal rights and opportunity under the law; that to give security to these things is the principal office of government, and that when government does not confer this security, it fails in its chief design.

* * * * * * *

Section 5. Religious freedom—liberty of conscience and belief—limitations. That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no human authority can control or interfere with the rights of conscience; that no person shall, on account of his religious persuasion or belief, be rendered ineligible to any public office of trust or profit in this state, be disqualified from testifying or serving as a juror, or be molested in his person or estate; but this section shall not be construed to excuse acts of licentiousness, nor to justify practices inconsistent with the good order, peace or safety of the state, or with the rights of others.

Missouri Statutory Provisions

Section 197.032, Revised Statutes of Missouri, Laws 1973.

197.032. Hospitals and medical personnel may refuse abortions—no denial of public benefits for such refusal—civil action, when

1. No physician or surgeon, registered nurse, practical nurse, midwife or hospital, public or private, shall be required to treat or admit for treatment any woman for the purpose of abortion if such treatment or admission for treatment is contrary to the established policy of, or the moral, ethical or religious beliefs of, such physician, surgeon, registered nurse, midwife, practical nurse or hospital. No cause of action shall accrue against any such physician, surgeon, registered nurse, midwife, practical nurse or hospital on account of any such refusal to treat or admit for treatment any woman for abortion purposes.

2. No person or institution shall be denied or discriminated against in the reception of any public benefit, assistance or privilege whatsoever or in any employment, public or private, on the grounds that they refuse to undergo an abortion, to advise, consent to, assist in or perform an abortion.

3. Any person who shall deny or discriminate against another for refusal to perform or participate in an abortion shall be liable to the party injured in an action at law, suit in equity or other redress.

Charter of the City of St. Louis[4]

Article XVIII, Civil Service:

Sec. 3 (n) Removals and demotions.—For removals, demotions and decreases in pay in the cases of employes whose

[4] Article XVIII, is reproduced in full in the printed Petn. for Cert. Appendix.

service rendered is below satisfactory standards, designed to promote the efficiency of the service. Such action shall be effective only after written notice to, with right of appeal in, the employes affected, and after such investigation as is appropriate to insure that the action taken is on the sole ground of merit and fitness.

Sec. 16. Racial, political and religious discrimination.— No recommendation or question under the authority of this article shall relate to the race, political or religious opinions, affiliations or service of any person. No person shall be appointed to a position in the classified service hereunder, nor be demoted, re-employed, promoted, removed, increased or reduced in compensation, nor in any other way be favored or discriminated against in any matter within the purview of this article, because of his race, political or religious opinions, affiliations or service.

Sec. 22. Violations of civil service provisions.—Any person who shall willfully or through culpable negligence violate or conspire to violate any provisions of this article or of any ordinance made pursuant theretofore which no other punishment is provided herein, shall be guilty of a misdemeanor, and, upon conviction thereof in any court of competent jurisdiction, shall be punished by a fine of not less than one hundred dollars and not more than five hundred dollars or by imprisonment for not to exceed six months, or both, in the discretion of the court. The conviction of any employe of any such offense shall operate automatically to terminate his service and to vacate his position. Any employe so removed from the service shall not be reinstated, reemployed or reappointed, or in any other manner re-enter the service of the City of St. Louis for a period of five years from the date of such conviction, and the comptroller and any other fiscal officers responsible for payment of any compensation to such person are hereby charged with notice thereof. Nothing in this section shall

be construed to supplant or in any way affect any prosecution that may be elected to be initiated under any other provision of law relating to the nonfeasance, malfeasance or misfeasance of public officers.

Federal Rules of Civil Procedure

Rule 52, findings by the court:

(a) *Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing the interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

QUESTIONS PRESENTED FOR REVIEW

I. Whether a woman's Federal constitutional privacy rights regarding abortion requires a municipally staffed and operated hospital to furnish medical personnel and facilities to comply with her request for an abortion based on her financial distress within her first trimester of pregnancy where no medical indications exist?

II. Whether the Fifth Amendment Due Process Clause of the United States Constitution and Rule 52(a) of the Federal Rules of Civil Procedure prohibit a Court of Appeals from finally reversing a District Court's well-found findings and substituting its own contrary Complaint constructions and untried factual conclusions, and then, for the first time, on such appeal relying thereon, levying punitive substantial "attorney fees" for "bad faith," without there having occurred any trial of any of such issues or conclusions in the District Court?

III. Whether Article III of the Federal Constitution requiring a case or controversy bars a Court of Appeals' judgment in favor of a woman pregnant at the time of filing suit for personal relief, and as sole representative of a class, claiming a constitutional right to an hysterectomy and an abortion by a municipality, where she secretly procures an abortion within five (5) days of filing and prior to summons of one defendant and before the case is heard by the District Court?

STATEMENT OF THE CASE[3]

Jurisdiction Below

The United States District Court's jurisdiction was predicated upon claims based upon the First, Fourth, Fifth, Ninth, and Fourteenth Amendments of the United States Constitution as-

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[3] Record support—

Due to the condition of disassociation of the multitudinous documents comprising the record, without congruity or sequential pagination, record support is indicated by descriptive identification and document internal citation. Where a matter or document is included in the single *Appendix*, a prefix abbreviation "App." is employed. To distinguish between District Court and Court of Appeals docket entries (abbr. "doc. ents.") of the record, the abbreviations "D.C." and "C.A." are respectively used.

serted under United States Code, Title 28, Chapter 85, Section 1343, Title 28, Chapter 151, Sections 2201 and 2202, and Title 42, Chapter 21, Section 1983.

The United States Court of Appeals' jurisdiction was grounded upon its statutory powers according to United States Code, Title 28, Chapter 81, Section 1291, the Federal Rules of Appellate Procedure, Rule 4(a), and the Federal Rules of Civil Procedure as applicable to the adjudication of appeals.

Facts Material to Questions Presented

This case was filed on August 17, 1973, in the District Court, Eastern District, Eastern Division of Missouri, by respondent as a sole plaintiff claiming to represent a too numerous class to join of pregnant women residents of St. Louis, Missouri (App. p. 1, D.C. doc. ent. 8-17-73; App. p. 6, Complaint, p. 3, par. 12). The only named defendants were John H. Poelker, Mayor of the City of St. Louis, and R. Dean Wochner, M.D., the City's Director of Health and Hospitals (App. p. 6, D.C. doc. ent. 8-17-73; App. p. 6, Complaint, p. 3, par. 13, and p. 4, par. 14).

The Complaint upon filing, after recitation of the jurisdictional grounds for the suit (see above), and an explanation of the failure to identify the respondent so as to avoid "embarrassment and harassment," claimed respondent was a married woman with a family, in her first trimester of pregnancy, who could not afford the expense of another child and consequent loss of employment because of the family's "severe financial straits;" that she suffered certain reproductive organ difficulties which necessitated an hysterectomy which properly should be simultaneously done with the abortion she desired. It was further alleged that she had gone twice in August of 1973 to one of the two hospitals of the City of St. Louis and was there advised by the hospital staff physician to get an abortion elsewhere and then return for the hysterectomy which "they" recommended be done. She

further alleged that such physicians expressed to her their refusal to abort her because of a "stated hospital policy of a blanket prohibition of abortions." The claimed basis for such refusal was that the petitioner Mayor, being the chief executive officer exercising control over the petitioner Director of Health and Hospitals and the City hospitals, on many occasions stated that abortion would not be allowed, and because of his high position, his statements were largely responsible for the existing situation of prohibiting abortions. The stated claim for bringing the action was her (and the class she claimed to represent) desire to utilize the personnel, facilities and hospital "for the termination of said pregnancy," and that such policies, rules, regulations, procedures, and practices interfere with and deprive her and "her respective physician of the right of privacy within the patient-physician relationship," and also deprive her of right as a woman "to determine for herself whether to bear children and maintain her marital privacy" as guaranteed by the Fourth, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution.

The relief prayed for in the Complaint was a declaratory judgment that any City policies, etc. barring, thwarting, limiting, and infringing upon the utilization of the personnel, facilities, and services of the City's hospitals for abortions, are violative of her and the class's constitutional rights; and for a "permanent injunction" to restrain petitioners and their agents from enforcing such policy, etc., against respondent or the class, so as to avoid "irreparable harm and injury to plaintiff and said class." This latter prayer for injunctive relief was stricken by respondent on October 11, 1974 (App. p. 6, Complaint; D.C. doc. ent. Oct. 11, 1974).

From the time of the filing of the case and continuing substantially to the time just before the trial a year later (e.g., Aug. 28, 1974), the respondent designedly withheld from the petitioners (i.e., defendants) her identity and all other factual

matters from which any knowledge of the truth or falsity of the Complaint's averments could be determined (App. p. 6, Complaint, p. 2, par. 4; D.C. doc. ent. 10-2-73; App. p. 54, C.A. Case No. 74-1232, doc. ent. No. 7, April 8, 1974, *Motion for Special Orders to Preserve, Guarantee and Effectuate Appellees' Rights to Fair Hearing and Due Process of Law;* Record, letter to Hon. Roy W. Harper, D.C. judge, July 31, 1974, from Eugene P. Freeman, Atty. for Defts.) Concomitantly, respondent sought to conclude the case favorably to herself before petitioners could conduct discovery (D.C. doc. ents. 9-12-73, 9-19-73, 10-2-73, 10-5-73; C.A. Case No. 74-1232, doc. ent. No. 3, April 1, 1974; D.C. doc. ents. 7-15-74, 9-17-74, 9-25-74). Because of the respondent's principal attorney's express refusal to cooperate in discovery without protective orders, while urging the petitioners and the courts the utmost of expedition of all other matters, petitioners, on September 21, 1973, moved the District Court for an order, with reasonable limitations which might appear proper, requiring submission to discovery according to the Federal Rules of Civil Procedure (D.C. doc. ents. 9-21-73, 2-25-74). No action was taken by the District Court upon either motion, and later at the first intervening appeal to the Court of Appeals (Case No. 74-1232), petitioners, to protect against respondent's urgings to the appellate court to decide her appeal on the broad constitutional questions incorporated in the Complaint, moved the Court of Appeals for protective orders against decision without opportunity for discovery and trial (C.A., Case No. 74-1232, Appellant's Statement, Brief and Argument, p. 29, et seq.; Op. cit. App. p. 54, and p. 3, C.A., Case No. 12-1232, doc. ent. No. 7, April 8, 1974). (The appellate court did not expressly rule on the petitioners' motion, but it did not decide the broad matters urged upon it by respondent, Petn. for Cert., App. p. A-11).

In addition to pressing for decision before petitioners could learn any of the facts relating to the case and at a time peti-

tioners were forced to make answer and respond to interrogatories without any knowledge about the case, the respondent misled the District Court and the petitioners by filing a motion for summary judgment supported by a false and deceptive affidavit on October 5, 1973 (App. p. 1, D.C. doc. ent. 10-5-73; App. p. 37). The falsity and deceptiveness lay in the fact that the affidavit tracted the Complaint's conclusionary allegations of fact, and added (see Affidavit of Jane Doe, par. 8) that she had been advised by a private physician:

> "* * * that the ordinary and routine medical procedure *in her situation* is to perform the abortion and hysterectomy in one surgical procedure, rather than two separate and distinct procedures, * * *."

(emphasis added); and at paragraph 9 of the affidavit it was sworn:

> 9. The present and real threat by defendants to implement and enforce the policy herein challenged deters said plaintiff from receiving medical care in a manner beneficial for her health and safety and in a manner consistent with the highest standards of medical practice.

The jurat of the affidavit was made on October 4, 1973, forty-three days after the respondent had been aborted (which was unknown to either the District Court or petitioners at the time), and the Notary Public administering the oath is one of the attorneys of the respondent then of record and active in the case. (See attorney names and signatures to Complaint and Affidavit of Jane Doe.)

The first factual knowledge of any kind that the petitioners learned about the respondent or her lawsuit filed on August 17, 1973, occurred through a television and radio public media account of an interview of respondent's attorney (or attorneys) wherein the statement was made that, at the time, February 22, 1974, the respondent had undergone a prior abortion at an

undisclosed date. However, no other factual information about the identity of respondent or the details of her District Court pending action was learned by the petitioners at this time.

As a result, petitioners filed a motion to dismiss, on the hypothetical truth of the news media reports, urging the reported abortion and possible hysterectomy destroying future possibility of pregnancy, as destructive of standing; reminding the Court that without a favorable ruling on their pending motion to require disclosure of the respondent's identity and submission to discovery process petitioners could not defend themselves (see D.C. doc. ent. 9-21-76); and also asking the Court to require the respondent to disclose the truth as to her bodily condition of pregnancy and hysterectomy (D.C. doc. ent. 2-26-76), for purposes of the petitioners' (i.e., defendants') motion.

In consequence of the foregoing, the District Court did require respondent's attorneys to inform the Court as to the extra judicially reported abortion. Respondent's attorney responded advising the Court that she had undergone an abortion on August 22, 1973.[6] No information regarding an hysterectomy was disclosed. At the time the respondent secured her abortion (i.e., 8-22-73) one of the petitioners had not been summoned (App. pp. 1 and 13; D.C. doc. ent. 9-4-73), and she had taken no action to secure *pendente lite* orders or other relief.

On March 22, 1974, the District Court sustained the petitioners' motion to dismiss (i.e., D.C. doc. ent. 2-26-74) and rendered a memorandum opinion (see Petn. for Cert., App. p. A-1). Respondent appealed to the Court of Appeals for the Eighth Circuit and by that Court's judgment the District Court was reversed and the case remanded for further proceedings in

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[6] See partial letter to Hon. Roy W. Harper, District Judge, from Mr. Frank Susman, plaintiff's (e.g., respondent) attorney, dated Feb. 25, 1974, later adopted as *Exhibit 1 to Court's Opinion* of March 22, 1974, (Petn. for Cert., App. p. A-1, l.c. p. A-10; D.C. doc. ent. March 22, 1974).

accordance with the opinion (C.A. doc. ents. No. 15, June 6, 1974; see Petn. for Cert., App. p. A-11). The gravamen of the Court of Appeals' holding was that standing upon filing was all that was constitutionally necessary to satisfy jurisdictional requirements.

After remand to the District Court, upon pre-trial conference called on August 9, 1974, to dispose the case for trial and fix a trial date, petitioners again urged the need for orders for discovery from the respondent, and it was then agreed by the Court and the parties that the respondent should expeditiously submit to oral deposition. It was further directed by the Court and agreed to by the parties that all of the respondent's (i.e., Jane Doe) testimony was to be held in strict confidence by the parties and the reporter, and petitioners' attorney was to file the original transcript with the Judge (rather than the Clerk of the Court) in order to maintain confidentiality.

On August 28, 1974, respondent Jane Doe's oral deposition was taken by petitioners.[7] Other than the aforesaid knowledge of the respondent's abortion, this was the first opportunity of petitioners to learn anything specific concerning the allegations of the respondent in the Complaint, the questions of the interrogatories, and the Plaintiff's Motion for Summary Judgment filed October 5, 1973.

After taking the respondent's deposition, the petitioners, then knowing the identity and specific factual assertions of the respondent, conducted their own investigation. Resulting therefrom, petitioners on November 1, 1974, filed their Motion for Summary Judgment supported by affidavits of each physician and hospital staff member who had come into professional

[7] Because of the special arrangements surrounding the taking and use of such deposition, no docket entries were made and the filed original of the transcript was within the personal custody of the Judge's chamber and outside the knowledge of the Clerk of the Court.

contact with the respondent, and the hospital records relating to her (D.C. doc. ent. Nov. 1, 1974). These squarely contradicted the respondent's evidence in support of summary judgment. On November 20, 1974, the District Court overruled both the respondent's and the petitioners' motions for summary judgment (D.C., doc. ent. Nov. 20, 1974).

Sometime shortly before the trial date of November 25, 1974 (D.C. doc. ent. 10-25-74) and after filing of petitioners' above referred to summary judgment motion of November 1, 1974, a pre-trial conference was held by the District Court Judge.[8] At such conference respondent's attorney for the first time (and shortly prior learning of petitioners' defense from the proof in support of the motion for summary judgment), inquired of the Court whether he might introduce evidence of the physician procurement procedures of the City. After a discussion of the matter by all present, the Court advised respondent's attorney that under the then status of the Complaint, such evidence was inadmissible, but respondent could either amend the Complaint to include such issue or file another lawsuit to litigate such matter.[9] In the history of the case the Complaint was never so amended, and the trial court at the trial following, consistently ruled that evidence of the respondent offered on such matters was beyond the scope of the issues formed by the Complaint and was inadmissible. The petitioners relied on these rulings and confined their defense and proof to the issues determined to be triable by the District Court's rulings (T. 57-58).

[8] Apparently a docket entry was not made, and petitioners are uncertain of the exact date. We now believe that a second conference, after that of August 9, 1974, was held. (See: Petn. for Cert. p. 15, first full par.)

[9] Support for the foregoing is found in the typewritten transcript of the trial of November 25, 1974 (*Transcript of Proceedings*, U. S. Dist. Ct. No. 73-C-565 (A); hereinafter designated by the abbreviation "T" with page indication); T. 57-58; see also *Respondents' Brief in Opposition to Petition for Writ of Certiorari* (etc.), pp. 9 and 10, quoting T. 60-61.

Upon trial without a jury on November 25, 1974, the case was presented in less than a full day, with a long noon recess (to accommodate respondent) and an early afternoon adjournment.

Respondent, through the Mayor and Doctor Wochner (Director of Health and Hospitals and Acting Hospital Commissioner) established that the policy or rule, existing for years pursuant to Missouri State law against abortion other than to save a mother's life, was directed to be continued to Doctor Wochner by the Mayor sometime in May, 1973, after his election in April of that year. As understood by the Mayor and Doctor Wochner, the question of jeopardy to the mother's life was a medical decision to be determined by the patient's attending physician (T. 6, 7, and 20). Intensive discussions were occurring between them up to the time this suit was filed regarding the legal, medical and moral questions of the policy, and that litigation was going on in the State with attendant great public uncertainty (T. 8). The Mayor has deep moral feelings against non-therapeutic abortions which was communicated to Doctor Wochner, but he (Wochner) believes abortion service ought to be given at the City's hospitals (T. 6, 7, 10, 20-26). Because of the continuing discussions and the Mayor's feelings, Doctor Wochner did not implement the installation of such service (T. 30-31). Doctor Wochner had weekly or biweekly conferences with his hospital medical cabinet at which the status of these discussions was reported, but the only person he informed in writing regarding such policy was the president of his medical staff. No general directive was made (T. 26-27). The working physicians and medical students, of City Hospital No. 1, gynecology and obstetrics Division No. 2, service, who came in personal contact with respondent, were not informed of such policy, nor was the chief of their said Division. And each testified that it was not a factor in their treatment of her (T. 49, 50, 85, 91-95, 101, 104, 108, 113-119). Further, neither of the hospitals bylaws dealt with abortion (T. 39).

The respondent's evidence demonstrated that the City's hospitals have an organic medical staff. Private physicians are not allowed to admit or treat patients in them. Each hospital patient is a patient of the City treated by City hospital physicians (T. 32 and 33). The City's hospitals are also medical instructional institutions having teaching relations with the two medical schools in St. Louis, namely, St. Louis University, a Jesuit, Catholic institution, and Washington University (formerly sectarian but is now nondenominational) (T. 33). Medical school teaching professors are furnished as staff instructors in many of the services of the City's hospitals and in some services medical students receive some of their clinical instruction (T. 31-33). The Ob-Gyn service at City Hospital No. 1 is staffed by physicians and attended by medical students affiliated with St. Louis University Medical School (T. 33). Respondent attempted to prove the physicians at City Hospital No. 1, practicing in Gyn-Ob Division No. 2, were prohibited through their affiliation with St. Louis University Medical School from performing non-therapeutic abortions at the Hospital before medical students. However, the Court overruled such attempts and admitted the personal professional, ethical, moral and religious views of such physicians as material to their theoretical interpretation and execution of the contested claimed policy of the Mayor (T. 57-58). Respondent's attorney admitted that physicians at the City's hospitals are entitled to their own ethical opinions and to act upon such opinions (T. 35).

The proof relating to respondent's factual relations was provided by her medical record kept by the Hospital (Resp. Ex. No. 2, T. 18 and 82); the testimony of the Hospital medical personnel who treated her there, and her account of the same occurrences.

The medical record and the medical personnel agreed that she had a long history of treatment at the Hospital starting in 1963 when she was 17 years old (Resp. Ex. No. 2, pp. 2-4). Immedi-

ately relevant to this suit she made a visit on August 7, 1973, at age 26, to the Gyn Clinic complaining of vaginal infection about which she had visited the Clinic about a month before. She also stated she thought she was pregnant and, if so, wanted to know the fetal age for a possible abortion with "Planned Parenthood" (T. 86; Resp. Ex. No. 2, pp. 7-8). Examination by a third-year medical student (under general supervision) indicated suspected pregnancy, vaginal infection, some small polyps in her cervical canal, and retroverted uterus. Her general condition of health was good. Routine laboratory tests were ordered including a pregnancy test; and she was given a future appointment to Gyn for August 13, 1973, to learn the outcome of the tests. She was also given medicine for the infection. No medical indications for abortion were observed (T. 85). She did not indicate she wanted an abortion at the City Hospital (T. 88).

On August 13, 1973, respondent returned to the Gyn Clinic where she again was treated by another third-year St. Louis University medical student. She was immediately told the test specimen of August 7, indicated she was pregnant. Whereupon she became very distraught saying because of the possibility of her husband going to prison she wanted an hysterectomy and an abortion (T. 96). The student then consulted with a physician superior who directed that she be given an appointment at the Obstetrics Clinic (T. 94). Because of her upset condition he gave her an appointment to the Ob Clinic for the next day, August 14, 1973. He found no medical indications for abortion or hysterectomy (T. 91, 94-95; Resp. Ex. No. 2, pp. [after No. 7] and 8), and that, at the time, he was unaware of any City hospital policy against abortion (T. 97). He advised respondent that, under her health circumstances, he knew of no physician at the hospital who would perform an abortion for the reasons she related (T. 96-97).

On August 14, 1973, she returned to the OB Clinic of the Hospital (Resp. Ex. No. 2, pp. 9, 10, 11 [12]) and was there

received by a staff physician who initiated a usual past history investigation when the respondent interrupted to ask if such was necessary since she was there only for the purpose of securing a statement of the length of gestation for possible cessation at another facility (T. 101). He told her that because of his personal ethical, professional, moral and religious beliefs, where she had no medical indications for abortion (T. 102 and 104), he would not give her such a statement to be used for abortion, but would refer her to another physician (whose beliefs he did not know) who might give her the statement she desired (T. 102). He, too, was unaware at that time of any City hospital policy against abortions (T. 107-108).

Immediately, respondent was referred to Dr. Ziad Abu Dalu, a graduate of the medical school of the University of Cairo, Egypt (of the Moslem Faith), who on the occasion was affiliated with St. Louis University since 1972, and a resident physician at the City Hospital (T. 110). During Doctor Dalu's initial interview of her she told him of her personal reasons for wanting to abort her child, amongst which he remembered was the possibility of her husband going to jail. She told him she had been to "Planned Parenthood" and had been asked to pay $175 for an abortion which she couldn't afford and, therefore, wanted the abortion from City Hospital (T. 112-113). He told her "we couldn't do one at City Hospital and I didn't explain to her my personal reason or otherwise." (T. 113). He testified that the reason he told her this was because in his medical judgment an abortion was not medically justified under her circumstances (T. 113, 118-119). He was aware of the University policy regarding abortions but not of a policy of the City (T. 118-119, 123). He gave her the certificate of fetal age she had requested (T. 116-117); such certificate was later tendered to the abortion clinic for the August 22, 1973, abortion, and procured from its records (T. 79 and 82; Exhibit B). Respondent appeared again at the Hospital OB Clinic the next day (August 15, 1973) and

was immediately referred to Doctor Dalu on her claim of bleeding from the vagina. He found her claim to be false (T. 114).

Respondent's testimonial version of the same occurrences was markedly different in several material respects. She claimed, contrary to the medical personnel, that she initially went to the Hospital to secure an abortion there (T. 64-65). Whereas, the medical records made at the time and introduced by respondent clearly recite that her initial purpose was to determine pregnancy and fetal age for use at another facility (T. 36, 64-66; Resp. Ex. No. 2, p. 7; Resp. Ex. No. 4 at 79, 82). The testimony of the Hospital medical staff also refutes her (see individual testimonial references, supra). She also attributed the physicians refusal to abort her as being based by them on a City policy against abortions (T. 67, 70, and 72). She attributed to Doctor Dalu advice that he would perform an hysterectomy on her at the Hospital after she was aborted elsewhere (T. 73). Whereas, none of the City physicians found any medical reasons for removal of her reproductive organs (Resp. Ex. No. 2; Defts. Ex. A and B, p. 118).

The District Court found that each medical student and physician who examined respondent at the City Hospital found no medical reason for aborting her and that such medical decision was based upon the opinion of the medical person uninfluenced by any policy of the City regarding abortions; and that none of them knew of any such City policy. The Court declared Section 197.032, Revised Statutes of Missouri, to confer the right upon these physicians (inter alia) to be free from any lawful coercion to perform abortions in the City's hospitals against his personal beliefs, and that the respondent did not challenge the physicians' actions under such statute. The District Court recognized a qualified Federal constitutional right of respondent to an abortion, but declared she had no right to demand that the City's physicians accede to her wish or the City so accede, where no medical reasons existed. The Court found

no design or purpose of the City to deny respondent any of her Federal constitutional rights.

The respondent appealed such decision to the Court of Appeals (C.A. 8th Cir.). The points raised before the Court were: 1, whether the District Court erred in ruling that the Complaint did not put in issue the City's procurement of physicians from a religious denominational medical school; 2. if the District Court erred in so construing the Complaint, whether the proof established a violation of respondent's Federal constitutional privacy rights regarding abortion because of the procurement of a medical staff possessed of professional beliefs against non-medically indicated abortion; and 3, whether, if respondent prevails, attorney fees on the basis of her acting as a "private attorney general" ought to be awarded (C.A. Case No. 75-1069; *Appellants' Statement, Brief and Argument*, pp. 9, 12, 21, and 26).

Petitioners vigorously defended against these contentions pointing out that respondent utterly failed to even point out or isolate any "clearly erroneous" findings of the District Court, and was asking for a trial *de novo* at the appellate level. The failure of respondent's proof within the issues framed by orders and rulings of the District Court was also urged; and the lack of an unlimited right in the respondent to demand an abortion contrary to the decision of the physicians was argued (C.A. Case No. 75-1069; *Appellees' Statement, Brief and Argument*, pp. 1, 24, 28, and 38).

The Court of Appeals, determined that the District Court erred in construing the Complaint to exclude the issue of medical staff procurement, and held that the proof established that the City's Mayor, through the combination of his policy against non-therapeutic abortions and the physician procurement practice, denied the respondent her constitutional rights regarding abortion. The Court also found that reasonable attorney fees

for the appellate stages of the litigation were $3,500, and awarded such sum to the respondent for acting as a private attorney general in securing the Federal constitutional rights denied by the Mayor; further, the Court ordered the District Court to determine and award reasonable attorney fees on the same basis to respondent, against the petitioners, for the trial phase of the case. Injunctive relief was awarded against the petitioners, requiring them to secure physicians who have no objections to performing non-therapeutic abortions. (See: Petn. for Cert., App. pp. A-27, A-40, A-44.)

Petitions for rehearing and for rehearing *en banc* were filed by petitioners which, while being denied, resulted in first modification of the Court's judgment striking the injunctive relief and substituting the same declarations of immediate constitutional duty as declaratory relief (see: Petn. for Cert., Appendix, p. A-40).

Thereafter, in due time, petitioners moved the Court to strike its award of attorney fees as unauthorized because the Federal statutes sued on, did not authorize such awards. At this time the respondent moved the Court to allow such fees on the basis of the "bad-faith" of petitioner Mayor Poelker. Such fees were so allowed by a second modification of the judgment. At the time of such order of modification, a right to file a second petition for rehearing and rehearing *en banc* was granted petitioners. Such second petitions were made and denied (Petn. for Cert., Appendix, p. A-44).

Upon remand to the District Court a hearing was held to determine the amount of reasonable attorney fees to be awarded according to the mandate. The District Court, applying the guidelines of a case cited as to be followed by the Court of Appeals, found the sum of $9,317.50 as a reasonable fee for the trial stage services, but on stipulated evidence showing no obligation to pay any attorney fees by respondent, and to

donate any fees adjudged to the American Civil Liberties Union (Stipulated Ex. No. 1, C.A. Case No. 75-1648), did not adjudge such sum against the Mayor (Petn. for Cert., App. pp. 55-56). The respondent appealed this judgment to the Court of Appeals (D.C. doc. ent. 8-14-75; C.A., Case No. 75-1648, doc. ent. 8-20-75). On January 5, 1976, the Court of Appeals reversed and remanded the case to the District Court for proceedings consistent with the appellate court opinion (*Jane Doe, et al. v. John H. Poelker, etc., et al.*, Case No. 75-1648; 527 F.2d 605, C.A. 8th, 1976). The District Court entered appropriate orders to comply with the Court of Appeals mandate.[10]

Pursuant to orders of the Court of Appeals, granted on motions of petitioners, the attorney fees sums of $3,500 and $9,317.50 awarded respondent have been paid into the registry of the District Court pending disposition of certiorari in the Supreme Court of the United States (C.A. doc. ents. Nos. 31, 32, and 12; C.A. doc. ents. Nos. 12 and 13).

SUMMARY OF ARGUMENT

I. Abortion on Demand

The Court of Appeals' holding that indigent pregnant women wishing to be aborted are denied equal protection of law under the Fourteenth Amendment of the Constitution when the City provides *childbearing* hospital care but has not established and provided abortion services after abortion became lawful, is in error since:

1. A woman does not have an absolute right to be aborted upon her own election, but has a limited constitutional right

[10] Record of District Court docket entries does not reflect proceedings after August 14, 1975.

to *her* physician's independent medical judgment and care as abortion may relate to her health and life.

2. The City, in providing childbearing medical services through its hospital in partaking in the exercise of the State's fundamental constitutional right, flowing from its highly important interest in promoting both maternal and child health and well-being which conceptually, is totally distinct and mutually exclusive from abortion, and as a logical consequence women electing to be aborted and thereby removing themselves from the area of inclusion where this interest of the State exists, are not then deprived of equivalency of treatment when the City does not act to meet their highly dissimilar choice involving substantially different medical services.

3. The assumptions of the Court of Appeals that routine or minor surgical procedures performed in the City's hospitals are medically indistinguishable from abortion procedures betrays a grossly insufficient comprehension of the factual realities of providing abortion services, and is in opposition to the Supreme Court's determination of the uniqueness and complexity of the abortion decision both for the woman and physicians in the practice of medicine and as it effects the hospital. Abortion confronts a publicly staffed hospital with multiple novel problems not encountered in other services. Staff procurement involves ideological (etc.) investigation and discrimination based upon unlawful bases. Administration must accommodate the full gestational period and be responsive to the particular physical and psychological circumstances of the patient. The facilities available are forced to be appropriated to the use of abortion cases without reference to the acute needs of other services. Personnel problems arising out of deep personal persuasions affect ordinary assignments, cooperation, and result in serious moral factors. All grossly at variance with other hospital routine services.

4. The Court of Appeals' mandate upon the City to provide physicians to perform abortions necessarily presents an insolv-

able constitutional dilemma for the City. As a consequence of the unique function the physician provides in the constitutional scheme of lawful abortion, the municipal hospital is constitutionally prohibited from participation in the abortion decision. At the same time the City must assemble a medical staff, which in its full spectrum, will embrace all ideological (etc.) incidents legally considerable as medical indications for the "abortion decision." In so doing it places at the service of the woman electing for abortion an effective power to negate the constitutional requisite of independent medical judgment, resulting in abortion on demand.

5. Under the circumstances of this case the Court of Appeals erred in its assessment of the constitutional implications of the facts since the policy complained of was shown by the proof not to have been involved in respondent's failure to secure from the City the abortion she wished; but that the personal views and persuasions, of the several physicians she encountered, proper and lawful in themselves, resulted in their independent medical decisions that she had no indications for abortion. And her complaint in essence, is a disagreement with the individual judgments and beliefs of such physicians and not with the ineffective City policy.

II. Appellate Abuse of Discretion

1. Overturning the District Court's Findings.

The Court of Appeals was, in fairness and equity, bound to recognize the great disability the petitioners were subjected to in attempting to defend against the deceptive litigational tactics and unfair strategy of the respondent, and that such circumstances had a crucial effect in shaping the issues to be tried and the conduct of the trial. However, after petitioners in good faith adapted to these circumstances and fairly litigated the claims taken by the trial court between the parties, and prevailed, the Court of Appeals materially abused its discretion and exceeded

its lawful powers, when on appeal it reconstrued the Complaint to include City hospital staff procurement which had been excluded together with evidence relating thereto by the District Court, and thereafter, without demonstration of error in the findings of the trial court, in legal effect retried the case *de novo* upon such reconstructed complaint, employing excluded evidence and adopted inferences to make its own finding on untried issues, and thereby reversing the District Court and depriving the petitioners of judgment without trial in violation of due process of law and the procedures of proper appellate review.

2. **Court of Appeals initiation of petitioner Mayor's conviction of "bad-faith" and imposition of punishment by levying "attorney fees."**

The Court of Appeals abused its appellate discretion through its interjection at the appellate level of the question of an award, and making awards, of substantial attorney fees against petitioner Poelker not raised by the Complaint nor authorized by the statute under which respondent sued, and then after recognizing the unlawfulness of such awards, changing its position to make identical awards upon a conviction of "bad-faith" with gross public castigation of petitioner, not tried before or found by the District Court, and without any notice, hearing, or opportunity to contest such conviction or castigation in the appellate court. Further, the essential bases for such conviction, namely: petitioner's official acts and judicial defense against respondent's claims, assumed by the Court of Appeals to be contrary to well-settled law; are factually erroneous and insufficient at law as a warrant for the imposition of punishment and public castigation.

III. **Justiciability, Standing and Mootness**

The Court of Appeals misapplied the rule of *Roe v. Wade* as to standing.

Since the respondent voluntarily procured her own abortion within five days after filing suit and at a time before both petitioners had been summoned, she thereby lost her *trial standing* to sue, made the issues she attempted to raise moot, and since she was the sole representative of the class, destroyed any class aspect the case theretofore might have had. When the Court of Appeals decided that respondent had standing and the case was justiciable and not moot, relying upon *Roe v. Wade*, it misapplied the appellate review standing rule to a *trial* standing situation, contrary to reason and the imperatives of Article III of the Constitution. The necessary character of Federal adjudication under such circumstances was the rendering of an "*advisory opinion*" without jurisdiction according to the Constitution.

ARGUMENT

Preface

On January 22, 1973, this Honorable Court's decisions of *Roe v. Wade*, 410 U.S. 113, and *Doe v. Bolton*, 410 U.S. 179, authoritatively defined the United States constitutional dimensions of a woman's rights to privacy in relation to the majority of the several states' criminal laws relating to abortion. While these decisions were fundamental and far reaching in their effect upon the legal-societal structure of our Nation, they were positively limited to the constitutional questions inherent in those cases before the Court. In a word, the Court did not attempt to address, much less resolve, the many other relationships and factual conditions that would necessarily and subsequently arise within the context of a woman's and other entities' constitutional rights relating to childbearing. This judicial situation not only obtained as a result of well-established rules of constitutional decision (q.v., *United Public Workers v. Mitchell*, 330 U.S. 75, l.c. 89, and *United States v. Raines*, 362 U.S. 17, l.c. 21), but by an express *caveat* of the Court (e.g., *Roe v. Wade*, 410 U.S. l.c. 165, n. 67). Historically and actually the Court later confirms this through *Planned Parenthood of Central Missouri v. Danforth*, — U.S. —, 44 L.W. 5198;[11] and *Bellotti v. Baird*, — U.S. —, 44 L.W. 5221. Clearly then, constitutional interrelationships in areas outside of these *Roe* and *Doe* landmark cases remained to be considered and adjudicated as they arrive before this Court; and until such authoritative settlement occurs, these "• • • secondary • • • issues" have remained open and subject to very diverse opinion and contrariety of decision before lower courts.

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[11] Citation to The Bureau of National Affairs, Inc., *The United States Law Week*, volume and page, official reports being unavailable at the time of writing.

Petitioners respectfully submit that this case (while containing other additional issues addressed in subsequent divisions of argument), is one of those not ruled by *Roe* and *Doe* or the later decisions of the same general constitutional field. The District Court clearly recognized this *hiatus* in controlling precedent (Petn. for Cert., App. p. A-23, fourth par.); however, we believe the Court of Appeals overlooked this absence of decisive pronouncement by the Supreme Court; but unintentionally confusing what are in truth its own interpretations and extensions as or for substantive teachings of this Court. The regrettable product of this phenomenon is the absence of any threshold analysis of the novelty of the issue involved with a resultant rationale of decision pointedly directed to such new questions presented.

This, we believe, was not the only unfortunate result, but because of the Court of Appeals so adopted perspective, other matters of the whole of the case were much adversely affected. As a concomitant matter, the Honorable Court of Appeals' perception of the petitioners' (and their attorneys) acts and litigational measures were unfortunately cast in a grossly unfavorable light not in accordance with the real truth of the situation and in opposition to the understanding of the District Court. This is greatly regretted and counsel assumes some measure of blame for an apparent failure to make matters clearer to the Court of Appeals. However, in the following presentation of our arguments upon the questions under review it is sincerely hoped that this Court is better served.

Finally, just as we respectfully disagree with the Court of Appeals because it is our strongly held belief that the Court reached results unsupported by reason, principle, and equity, we also wish to make abundantly clear that our references to matters of record and vigorous argument thereon about trial tactics and strategy of opposing counsel, is not intended or to be construed as personally attacking these brothers at the bar, but

likewise is occasioned because these referred to incidents of the case are thought to be highly significant in communicating the merits of our claims to this Supreme Court for its dispassionate consideration.

I. Abortion on Demand

At the outset in addressing the question of the City's duty to render abortion services to the respondent as adjudged by the Court of Appeals, petitioners urge that it is crucial in the valid application of rationality to the facts of this case to appreciate that, in literal, factual accuracy, this case does not present a situation where a woman's claim of unconstitutional limitation upon her privacy rights in deciding upon abortion or in carrying such abortion is actually involved.

Rather, analysis of the significant facts compel the conclusion that what is truly or objectively present is the respondent's claim (somewhat obscured by diverting immaterial considerations) that she has, after personally electing for abortion, a further additional constitutional right to coerce the state (e.g., defendant municipality) to accede to her demand (politely phrased as a "wish") and participate to the extent of providing the required medical personnel, services, and facilities to carry out the abortion for her.

Nowhere in the factual incidents of this case has the City or its officials, in precise fact, actually interfered with to stop, deny, prohibit, or otherwise directly negate the respondent's decision to abort her pregnancy or to prevent her from carrying such decision out. This fact is particularly highlighted by the settled circumstance that respondent did procure on her own the abortion she determined upon.

Logically, it is only through a process of reasoning which must first postulate a constitutional duty on the part of the state

of placing the means for abortion at the respondent's disposal that the constructively arrived at colorable claim of "interference" with her privacy or a constitutional deprivation arises. It is this proposition that the Court must consider and adjudicate in the light of reality and its necessary consequences. Such an examination of the constitutional dimensions of this novel question must, of course, take into account the situation not only from the standpoint of the respondent's position, but also the pertinent factors supporting the constitutional claims of the state. In this it appears highly important to bear in mind and repeatedly emphasize that this case commends itself to the Court as one of undiluted constitutional character, having no aspect of statutory, derivative, constitutional implications.

Examination of the merits of the Court of Appeals opinion[12] supporting its judgment of petitioners' unconstitutional "discrimination" against respondent, demonstrates that it is expressly based upon a conclusion that the "[C]ity policy" prohibiting elective abortions coupled with the City's physician procurement history ". . . combine to deny Doe [respondent] and her class the equal protection of the law. . . ." afforded by the Fourteenth Amendment of the United States Constitution.[13]

In support of this decisional conclusion of Fourteenth Amendment, Equal Protection Clause violation, the Court of Appeals declares that the City, constructively is telling indigent women like Doe [respondent] that:

> . . . if they choose to carry their pregnancies to term, the city will provide physicians and medical facilities for full maternity care; but if they choose to exercise their constitutionally protected right to determine that they wish to

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[12] Doe, et al. v. Poelker, (etc.), et al., Petn. for Cert., App. p. A-27.

[13] Ibid., Petn. for Cert., App. p. A-35.

terminate the pregnancy, the city will not provide physicians and facilities for the abortion procedure, even though it is probably safer than going through a full pregnancy and childbirth.[14]

Reasoning from this *posited* assessment of the situation obtaining the Court then immediately explicates its *ratio decidendi*:

> . . . And it is certainly true that this distinctive treatment represents as much interference in the abortion decision of an indigent woman by the city as the prohibition of all non-therapeutic abortions in city-operated hospitals condemned by this Court in *Nyberg v. City of Virginia*, 495 F.2d 1342 (8th Cir.), *appeal dismissed*, 95 S.Ct. 169 (1974) . . .[15]

Two immediate observations can be made regarding the Court of Appeals declarations. Initially, it ought to be clearly noted that the Court appeared to believe that the woman's wish or desire for abortion is the real determinate factor, as distinguished from the medical determination by the personal physician in consultation with his patient as repeatedly taught by *Roe v. Wade*, 410 U.S. 163, 164, and 165; and also that the woman's rights in the abortion decision are not absolute, ibid, at 153. These postulates were, of course, lately reaffirmed in *Planned Parenthood of Central Missouri v. Danforth*, — U.S. —, 44 L.W. 5197, l.c. 5199 "III." This assumption of the woman's ascendancy is not merely semantical but is repeatedly demonstrated as being substantive by the Court of Appeals' discussion emphasis of the woman's "wish" or "desire" and its final command to the City to procure ". . . physicians and other necessary personnel whose personal views on abortion do not prohibit them from providing an abortion . . ."[16] It can be well said

[14] Ibid., App. p. A-33.

[15] Ibid., App. p. A-33.

[16] Ibid., App. p. A-36.

from this that such reasoning, at the very least, infuses the opinion with a questionable basis in *Roe v. Wade* and *Doe v. Bolton*.[17] Secondly, the fact of "distinctive treatment" between maternity cases and elective abortion cases as being violative of constitutional equal protection, is a qualitative judgment which is not self-evident, or expressly premised upon any authoritative instruction of the Supreme Court. In following discussion we have urged what we believe to be substantial reasons to support an opposite principled result.

In fairness to the Court of Appeals, the pertinent rationale of the decisions it cites as supportive of its reasoning are required to be analyzed and critiqued for their intellectual persuasiveness on the question.

The starting point of the Court of Appeals legal reasoning is its reversion to its own decision of *Nyberg v. City of Virginia*, 495 F.2d 1342 (C.A. 8th Cir. 1974); app. dis. and cert. den., 419 U.S. 891 (S.Ct. 1974). In this case the Court held a municipal hospital resolution restricting the performance of abortions in the hospital to instances required to save the life of the mother, to be unconstitutional as unduly restrictive of a woman's constitutional rights of abortion on the authority of *Roe v. Wade*. A fact crucial to understanding the application of the decision is that the physician involved were private physicians (admitted to practice at the hospital) who were desirous of using its facilities for the performance of abortions on their private patients at the City's hospital and were prevented from doing so by the aforesaid resolution. (See: *Nyberg v. City of Virginia*, 361 F.Supp. 932 (D.C.D. Min., 1973), l.c. 939; *Doe v. Poelker*, D.C.E.D.E.D. Mo., Jan. 13, 1975, Petn. for Cert., App. p. A-19, l.c. A-24 to A-25).

In assaying *Nyberg*, it is patently evident that the Court of Appeals in articulating its decision did not proceed from a

[17] See note No. 8, infra.

fundamental constitutional examination of the question of a state's duty to provide a woman with the means for making the abortion decision and if decided upon, its accomplishment. Rather, the case was viewed as presenting the narrower issue of the physician's constitutional right to utilize the hospital's facilities for carrying out abortions he had already decided to perform. This latter question does not involve the state in the *decision* aspect but only the provision of medical service adjuncts to the woman's physician. (See Court's disclaimer of affecting the broader proposition at 495 F.2d 1347, [7].) Confined within this legal framework the Court then, first *positing* the *Roe v. Wade* established physician's function of making the abortion decision,[18] transposed the state's duty to refrain from interfering with the abortion decision to a legal constitutional equivalency with providing the physician with the facilities for effectuation of his decision to abort his patient. The legal warrant for this logical inversion of the constitutional principle adopted is largely taken from the case of *Hathaway v. Worcester City Hospital*, 475 F.2d 701 (C.A. 1st Cir. 1973). Several repeated factors quoted from this case are isolated as sufficient to impose such a constitutional duty upon the municipal hospital (e.g., state). These being: in order to service the physician, no new or different facilities would be required, nor would the normal routine of the hospital be disrupted; and that abortion is "medically indistinguishable from other surgical procedures" routinely provided by the hospital. The *hiatus* of logical connection between the existence of a constitutional right to make the abortion decision and to carry it out on the one hand, and a duty of furnishing of the means by another to facilitate the operation on the other hand, is apparent. The convenience to the physician (and collaterally the woman) and the postu-

[18] The Court curiously denominates the "abortion decision" of the physician recognized in *Roe v. Wade* as ". . . a constitutionally protected *choice*. . . .", (emphasis added) in speaking of what the Supreme Court clearly defines as a medical judgment (495 F.2d 1347).

lated lack of detriment to the hospital are raised to the status of constitutionally decisive considerations. In final justification the Court repeats in balder terms its *ipse dixit*, in form substituting the obverse of its decision, labeled as a *"non sequitur,"* apparently believing this to be a persuasive elucidation of reason supporting its result (495 F.2d 1346).

Examination of *Hathaway v. Worcester City Hospital*, supra, readily confirms that the Court of Appeals in *Nyberg* faithfully adopted its rationale. Essentially the "medically indistinguishable surgical procedures" with equivalency of risk, and availability of required facilities factors, are relied upon to disallow any compelling state interest to overbalance the *Roe* and *Doe* "fundamental right interest" of the woman desiring a sterilization.

Doe v. Rose, 499 F.2d 1112 (C.A. 10th Cir., 1974); *Doe v. Rampton*, 366 F.Supp. 189 (Utah, three-judge Ct., 1973); and *Klein v. Nassau County Medical Center*, 347 F.Supp. 496 (E.D. N.Y., three-judge Ct., 1972), reversed and remanded 412 U.S. 925 (not relitigated), are of a common rationale, placing the substantial grounds for decision upon the assumed invidious discrimination against indigent women electing for abortions by the denial of medical services to them while providing care to mothers bearing their children. Such an extremely broad basis for constitutional resolution, in *extremis*, necessarily disposes the whole of the national power, including the nation's collective resources, at the immediate service of "fundamental rights" as a *constitutional* precept. Constitutional rights become self-enforcing since few, if any, legislative or executive determinations exist which cannot be arguably convicted of being of a "suspect classification" when collaterally or indirectly touching a consistently expanding category of fundamental constitutional rights. (Cf. *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Young v. American Mini Theatres, Inc.*, 44 L.W. 4999; and *Dandridge v. Williams*, 397 U.S. 471.)

In *Wulff v. Singleton*, 508 F.2d 1211 (C.A. 8th Cir., 1974),[19] the Court of Appeals reiterates its adopted postulates of *Nyberg* and also directs attention to the indigency consideration, citing *Klein v. Nassau County Medical Center*, supra.

Opposed to this reasoning settled upon by the Court of Appeals, we wish to respectfully suggest a considerable number of matters which would seem to negate the fundamental basis underlying a state's constitutional duty to service women electing to abort their pregnancies for non-therapeutic reasons. Because of the litigational history of this case where the trial court excluded issues and evidence only later raised by the Court of Appeals, supportive matters of record are absent, necessitating reliance upon commonly understood matters or those subject to judicial notice.[20]

This Court in *Roe* and *Doe*, because of the nature of the issues involved, centered its interest and ultimately evolved its judgments upon the constitutional rights of women in the particular area of the abortion situation. But resolution of such issues implicated considerations of legal relationships not strictly confined to the abortion aspect of human generation.[21] As a necessary corollary to fixing the woman's constitutional position regarding abortion, the Court had to accommodate the state's interests in the greater context of childbearing. As a necessary power to realization of the well-being of ordered civil society, the Court recognized a special state interest, of first-order constitutional importance, in the life and health of the mother, embracing the whole of the range of physiological and psychological considerations (410 U.S. 159, 162-163). This interest, except as adjusted to accommodate the woman's reciprocal

[19] Reversed and remanded by Supreme Court July 1, 1976 (44 L.W. 5213).

[20] See infra, Argument II.

[21] Roe v. Wade, 410 U.S. 113, l.c. 177.

prerogative in the special abortion context, was found to be universal and of the most fundamental nature. Even the woman's rights in the abortion realm were declared to be of a limited order reaching only so far as the objective necessities of her well-being might require (410 U.S. 153 and 410 U.S. 189). The conjunctive agent for the actualization of these interests and their accommodation between the woman and the state is the duly licensed physician (410 U.S. 164-165).[22] Further, the Court recognized a state interest in the fetus being borne, in that its maturing existence and proper well-being is likewise a matter of vital concern to the state and within its protection and nurture, conditioned only by the superiorly recognized life and health considerations of the physician for the mother (410 U.S. 163-164).

While this order of constitutional rights, of course, is applicable to and adjusts the abortion situation as conditioned by the privacy interests of a woman, in reason and principle these postulates arise from and have logical relevance to the greater whole of the human phenomenon of childbearing. When the natural course of nature is uninterrupted for maternal life or health considerations, the gestational progression resulting in childbirth is of vital interest to the state. Here its interest in the life and health of the mother and of that of the developing future infant citizen, exists in the widest and most profound sense (410 U.S. 180). As a characteristic of the situation, the most perfect coincidence of interests exists between the mother and the state and, of course, the irresistibly presumed interest of the maturing infant. The harmony of this mutually integrated relationship of interests is concretely realized through prenatal, obstetrical, postpartum, and pediatric care universally contemplated as optimum. The rationally hypothesized interest of the state can be initiated even at a pre-conception state, then to continuously exist throughout the gestational cycle, and thereafter, all referable to the legitimate continuity embracing child-

[22] See: Planned Parenthood of Central Missouri v. Danforth, 44 L.W. 5200, par. "III."

bearing. This is to say, conceptually, childbearing is an independent phenomenon of human existence. It reasonably constitutes a separate, distinct, and exceptionally important aspect of human concern. Obviously, continuation of the Human Race is solely dependent upon it. In this it is apart from all other human functions, and abortion is conceptually foreign to it.

The Court of Appeals' decision in this case would constitutionally justify the imposition of a duty upon the City (as a subordinate organ of the state) to provide abortions to indigent women on a presumed equivalency of the abortion operation with other minor surgical procedures commonly performed in general hospitals. However, such a view, whatever its validity might be in other circumstances, appears to be too restrictive and rationally deficient when applied in the context of the hospital required to furnish *both* the "abortion decision" and if professionally determined to be done, the actual performance of the abortion.

This Court, in its exhaustive examination of the nature of a woman's constitutional privacy rights in the area of abortion (*Roe* and *Doe*), has concluded that a woman does not have an absolute constitutional right to determine for herself whether she will carry a pregnancy to term or terminate it through abortion (410 U.S. 183, 189). The Court has recognized that the matter is infinitely more complex (410 U.S. 177 [18]). The woman and her responsible physician must necessarily confer within a relationship of intimate awareness of the most important considerations involved in the woman's physiological and psychological existence; with the physician possessed of these matters, and giving weight to them as he deems appropriate to the patient's circumstances, he arrives at his thusly informed judgment. This, of course, may be affirmative or negative in relation to abortion. If affirmative and the patient consents, the course thereafter is purely technical in carrying out the surgical operation.

The Court of Appeals' view of the situation gives no consideration to these most important aspects that precede the actual performance of the abortion—if indeed, an abortion is to be performed. The rational reach of the Court of Appeals' limited analysis reduces the matter to a simple "surgical procedure." This does not accord with either the nature of the objective considerations of the situation or the finely thought out applicable pronouncements of this Court.

This abbreviated understanding which the Court of Appeals imposes on the situation is destructive of that proper order of the relationship of the City to its publicly employed, organic hospital staff physicians (and other medical specialties) and the professionally autonomous relationship of these physicians to the patients serviced at the City's hospital. The nature of the matter is not that of simply procuring technically proficient surgeons to comply with women's elections to have abortions.

The declaratory command of the Court of Appeals on the City is gross and unconditional:

> . . . to obtain the services of responsible physicians and other necessary personnel whose personal views on abortion do not prohibit them from providing an abortion. . . .[23]

This essentially requires the City to enlarge its physician, nursing, and laboratory hospital staff so as to accommodate to multiple and disparate personal views of these specialties regarding abortion. An initial major division is required, namely: the addition of ". . . personnel whose personal views on abortions do not prohibit them from providing abortions. . . ." However, within this new division of a two-part parallel medical staff. encounter occurs with gradations and shadings of medical ethics, personal morality, variations of religious beliefs, and other pertinent factors of individual ideology regarding abortion. This

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[23] Petn. for Cert., App. p. A-36.

phenomenon exists because abortion is not simply an "indistinguishable surgical procedure," but as the Supreme Court recognizes, abortion implicates and converges upon the whole range of human considerations.

Direct action by the City in attempting to assemble such a staff immediately involves the City in devising its procurement procedures so as to discriminate regarding such ethical, moral, religious beliefs and ideological persuasions of its prospective employees. Obviously, medical qualification in a technical sense does not satisfy the problem. We have yet to have the guidance of the Supreme Court regarding the general Federal constitutional propriety of such a course (e.g., First Amendment and Fourteenth Amendment, U. S. Constitution) or any specific accommodation to such existing law as Missouri constitutional equivalents, statutory provision Section 197.032, Revised Statutes of Missouri, Laws 1973, and the City's Charter, Article XVIII, Sections 3 (n), 16, and 22[24] as are posed here. But sufficient constitutional legal analogies exist to clearly indicate the gravity of the problem.

Where the City to succeed in accommodating to such staff procurement legal and practical impediments, the same genus of problem would again be experienced in actual practice. Since it must be appreciated that patients of the City's hospitals are not admitted as an adjunct service to a privately practicing physician as in *Nyberg* (having already made the "abortion decision") but through clinical (and emergency) intake arrangements, the same ideological (etc.) considerations come to the fore. Women priorly personally determined upon abortion must be attempted to be accommodated with hospital staff personnel meshing with whatever each individual woman's circumstances might be. To say that the woman's personal health factors re-

[24] Section 197.032, R.S.Mo., L. 1973; and Charter of St. Louis, Art. XVIII, Secs. 3 (n), 16, and 22 are reproduced in Petn. for Cert., pp. 7-9, and Petn. for Cert., App. p. A-65.

garding the medical decision of abortion are objective and apart from her personal conviction of the advisability of abortion does not accord with the reality of the legal range of considerations recognized by *Roe v. Wade* as medically permissible.[25] Because the range of medical warrants for abortion is, for practical purposes, unlimited, the demand of a woman for abortion at the City facility, if not accommodated can only raise the question of the ethical, moral, religious or ideological "insufficiency" of the medical staff such as is presently encountered in this case. This phenomenon operates to confer on women domination over the "abortion decision" contrary to the expression and spirit of the nature of her constitutional rights under *Roe* and *Doe*. Her "wish" or "desire" is transmuted into the medical decision. The conclusion appears inescapable that the rule of the Court of Appeals generates deep impermissible entanglement of the City with the abortion decision where the state is constitutionally prohibited, yet the while doing violence to fundamental rights of physicians (etc.), but unfortunately resulting in "abortion on demand" contrary to *Roe v. Wade*.

The largely assumed factual premises of the Court of Appeals for its concluded presumption of City interference in the respondent's abortion rights, themselves merit careful inspection. Repeating, these assumptions are: abortion is a medically indistinguishable surgical procedure from most other routine operations of general hospitals; the risk of abortion is no greater than other comparable surgical procedures; and performance of abortions does not interfere with normal hospital routine or require further staff facilities. The etiology of these assumptions can at least be partially explained by the fact that the Court interjected physician into the case for the first time on appeal and therefore no development of these decisional matters occurred below. Again, as beforesaid, the paucity of the record mandates that these considerations be discussed in general terms.

[25] Op. cit., *Roe v. Wade*, at 410 U.S. 177 [18].

As a point of initiation, as before said, the assumption that abortion is a "medically indistinguishable surgical procedure" etc. appears flatly in contradiction to the express views of the Supreme Court in *Roe* and *Doe*. There the Supreme Court alluded to the comprehensive range of medical considerations bearing on the abortion decision (e.g., 410 U.S. 177). Particularly, the nature of elective abortion as it relates to physical and psychological well-being is unique. No other medical decision approaches its profound status. Moral, ethical, and religious factors are negatively or affirmatively present for each person involved, including not only the patient but the physicians, nurses, associated technicians, social workers, etc.[26] Considering the Court of Appeals equation of abortion with surgical procedures, for rational insight, one is reminded of the oft quoted remark of Thomas Szasz that the abortion operation bears about as much relation to medical judgment as capital punishment does to electrical engineering. One is hard pressed to recall any other surgical procedure where medical exploratory operations are first performed to establish existential facts such as sex of the fetus, the ectopic nature of the pregnancy, the deformed or diseased condition of the embryo such as Down's syndrome or Tay-Sachs disease, upon which the basis for the mother's reasons are thereafter *formed*, and then medically evaluated in the *after-occurring* "abortion decision."

The Court of Appeals reliance upon its assumption that the hospital routine is not interfered with by the performance of abortions, seems also to be the product of a deficient record and foreshortened analysis of the necessities inherent in the situation. Much has been said foregoing to demonstrate the unique and grave problems of staffing and the peculiarities of operations. Appurtenant to these considerable problems, in order to fairly

[26] Kibel, H.D.: Staff Reactions to Abortion: A6 Psychiatrist's View. Obstet. Gynec. 39:128-33, Jan. 1972.

Connor, E.J.: Therapeutic Abortion. Audio-Digest Ob. Gyn. Vol. 17, No. 16, Aug. 18, 1970.

understand the hospital situation, it must be remembered that the City hospital cannot approach the service of abortion as a private institution might. Regard for the patient prohibits the production-line phenomenon of the abortion clinic such as elucidated in the fatcs of this controversy[27] and recognized in *Planned Parenthood of Central Missouri v. Danforth* (supra, 44 L.W. 5209, Mr. Justice Stewart's concurring opinion, n. 2). Abortion service of the City cannot be limited to any stage or duration of pregnancy; nor can other disease, illness (physical or psychological) or socially debilitating factors of the patient be ignored in haste to simply "terminate the pregnancy." Each of these matters can and do make distinctive demands upon the administration, medical staff, and facilities of the hospital. Unsuspected phenomena are endemic to abortion. For the psychological well-being of both, expectant mothers and women scheduled for or recuperating from abortions, ideally should be isolated from one another.[28] Laboratory technicians as a class exhibit the same strongly held disparity of views as others. Nurses (as the physicians) in significant numbers also divide requiring separate administrative treatment and additional numbers to accommodate abortions. Even custodial workers who are charged with associated duties as disposal of fetal corpses have the recognized right to legally separate themselves from the abortion situation. Serious problems of staff association and otherwise presumed routine cooperation arise over disparate ethical attitudes and deep emotional feelings, actually resulting in interstaff hostility.[29] The added fact (acutely ap-

[27] See Record; deposition of Jane Doe, Aug. 28, 1974, plaintiff, pp. 29-34, and 47-54.

[28] McDermott, J.F. and Char, W.F.: Abortions Repeal in Hawaii: An Unexpected Crisis in Patient Care. Amer. J. Orthopsychiat. 41: 620-26, July, 1971.

[29] Heller, A., Whittington, H.G.: The Colorado Story: Denver General Hospital Experiences with the Change in the Law on Therapectic Abortion. Americ. J. Psychiat. 125: 809-816, 1968.

preciated by medical personnel that abortion practice is a new specialty beyond the experience of most physicians, and is probably the most highly lucrative medical field,[30] compounds the hospital problems of adequate staffing and morale. Medical school affiliation with the City hospital necessary for proper accreditation, is vitally affected over abortion considerations; this is

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Thompson, H., Cower, D.L., Berris, B.: Therapeutic Abortion: A Two Year Experience in One Hospital. J.A.M.A., 213: 991-995, 1970.

"Second Thoughts on Abortion from the Doctor Who Led the Crusade for It." Good Housekeeping, March, 1976, p. 69. This article recounts Dr. Bernard Nathanson's directorship of the largest abortion clinic in the Western hemisphere and his subsequent departure from that work because, "I became convinced that as director of the clinic I had in fact presided over 60,000 deaths." The article discusses staff problems in this way:

> As administrator, Nathanson never saw these women. What he did see was the gradual psychological disintegration of much of his staff.
>
> "The pressures, external as well as internal, on everyone were just enormous," he recalls. Doctors regularly worked 12-hour shifts. One commuted weekly from Kentucky, flying up for a long weekend during which he manned the vacuum aspirator almost around-the-clock, and returning Monday morning to his regular practice.
>
> But it wasn't just a matter of overwork. Psychological factors, stemming perhaps from subconsciouos guilt and inner misgivings, must also have been playing a part. Doctors began "losing their nerve in the operating room," Nathanson says. "I remember one sweating profusely, shaking badly, nipping drinks between procedures." Heavy drinking became a problem with several. Some doctors and nurses complained of deep depression, and some were plagued by terrifying recurring nightmares. One doctor's worried wife cornered Nathanson at a party and anxiously reported that her husband was dreaming continually of blood.
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> "I was seeing personality structures dissolve in front of me on a scale I had never seen before in a medical situation," he recalls. "Very few members of the staff seemed to remain fully intact through their experiences."

[30] Connor, M.J.: Abortions on Demand. A Boon to Moonlighting Doctors. Medical Times. 99: 155, 1971.

evident in the facts of this case involving a religiously affiliated medical school, but this same reluctance to be publicly identified with providing or cooperation in abortion service is experienced with the non-denominational medical school. The equivalency of risk of abortion with other "minor" surgical procedures is patently false.[31] Perhaps the Court lapsed into the error of equating "childbirth" with *first trimester abortion* as a basis for its conclusion. However, if the whole range of abortion service with its attendant complications is considered, the invalidity of the Court's assumption is manifest.

From these essential considerations recalled foregoing, petitioners respectfully suggest that abortion in public hospitals with organic staffs, does not present a simple question capable of easy solution by reversion to prior constitutional precepts of Equal Protection enunciated by this Court. This is to say, the question cannot be safely decided by indiscriminate adoption of either the *Shapiro v. Thompson*, supra, or *Dandridge v. Williams*, supra, rationales. Here a totally new fundamental right—abortion—exercised in a novel and most grave environment is involved. Treatment of the situation through talismanic tests of "fundamental right" and "compelling state interest" approaches, or by an adopted characterization as "social or economic field" matter does not appear to fairly do justice to the realities of the legal-factual circumstances.

As essentially explicated by *Roe* and *Doe*, women's abortion rights are exercisable in a frame of reference of a woman's life or health and only as determined by a physician. This infused independent, physician judgmental, constitutional aspect cannot

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[31] Wynn, M. and Wynn, A.: Some Consequences of Induced Abortion to Children Born Subsequently. The Foundation for Education and Research in Child Bearing. Marriage and Family Newsletter, February, March, April, 1973.

Hilgers, Thomas W.: The Medical Hazards of Legally Induced Abortion. In: Hilgers, T. W. and Horan D.J. Eds. *Abortion and Social Justice*. Sheed and Ward, 1972, pp. 57-85.

be conditioned or "interfered" with by the state or by third persons (*Planned Parenthood of Central Missouri v. Danforth*, supra, and *Bellotti v. Baird*, supra), nor properly dictated even by the woman herself. From the nature of the abortion phenomenon and this constitutional matrix in which it must be considered in particular relation to public hospitals furnishing physicians (etc.) for the "abortion decision," a necessary incompatibility arises. Negation of the fundamental constitutional prohibition, protecting against degradation or obliteration of the physician judgmental function, occurs and cannot realistically be avoided when the state is constitutionally obligated to provide a physician staff, which in the totality of its composition is coextensive with the abortion dispositions of all women it is coerced to service. Such arrangement is self-defeating in that it destroys that essential ingredient of constitutional regard and care for women. The end result is to invest women, not with their constitutional due, but to deprive them of the very vitals that the Supreme Court has justified abortion upon in the first place.

The decisional concept of *indigency*, which the Court of Appeals applies as a constitutionally crucial factor, appears in principle and reason unrelated to the nature of the context of its constitutional Equal Protection investigation. Such a consideration would appear to be more apt if the inquiry were directed toward a setting created by a Due Process claim of impermissible classification rather than arising negatively as here (*Dandridge v. Williams*, 397 U.S. at 485-486). When it is remembered that abortion was almost universally, nationally prohibited with a consequential absence of its existence as a lawful medical service provided either privately or publicly, a necessary postulate of legislative election to enlarge state provided social welfare would appear to be a minimum prerequisite to a claim of class discrimination. Especially so here, where the "class" and the assumed "interference" are the products of a judicially arrived at constructive establishment. We suggest that

there is no compelling principle requiring the State to provide a certain category of medical service simply because a citizen has an abstract right to make its election (albeit under limiting conditions), apart from its realization simply because of indigency. How, it might be asked, does the elipsis excluding such a hypothetical *constitutional right to abortion performance* for persons who are *not* indigent, arise to a compelling constitutional status in the case of an indigent? We respectfully urge that economic distinctions between citizens in this context are not appealing bases for fundamental, *constitutionally* differing attributions of rights. The City has not conditioned enjoyment of the constitutional right to abortion operations upon paying a fee so as to deny a fundamental right to those without the capacity to pay (*Harper v. Virginia State Board of Elections*, 383 U.S. 663).

There are also compelling reasons for not constitutionally equating abortion with childbearing medical services. As discussed foregoing, we urged that the State has a vital, recognized constitutional interest in childbearing. The State's promotion of this interest is time-honored and of unanimous acceptance. Not only is there a long history of positive law enactment to protect and aid mothers and their future offspring (e.g., the Social Security Act, labor laws, etc.) but affirmative provision of a wide range of medical service for childbirth and pediatric care are so much a part of our social fabric as to be obvious. This situation, of course, does not obtain for abortion. To take such an historical recognition and societal provisions for childbirth and to contrast such phenomenon with the very recent legalized abortion milieu as a reasoning process to conclude that such difference is an unconstitutional impairment, appears logically unacceptable. As before urged, childbirth and abortion are of a different order of human concern and experience. Not only are they absolutely, mutually exclusive in nature, but the common fact that both are involved within the context of human generation offers no appealing reason for introducing abortion as a part of the continuity of childbearing so as to postulate a require-

ment of equivalence in treatment. This is to say, because the State has a long history of service to childbirth, such fact, now that legalized abortion exists, is no rational basis for support of the conclusion that an unconstitutional discrimination now passively occurs if abortion service is not now affirmatively provided (*Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61).

Finally, the Court is asked to note that the Court of Appeals declared that the respondent's constitutional rights regarding abortion were violated by a *combination* of the Mayor's policy against non-therapeutic abortion *and* the staffing of the hospital with physicians who would not perform abortions without what they considered to be sound medical indications.[32] These physicians did not embrace the psychological factors that may be taken into account in the medical decision relating to pregnant women's health, as being professionally ethical, or morally admissible indications for abortion because of their own private or individual persuasions.[33]

As is plainly evident in the facts of this case and so found by the District Court, the so-called Mayor's policy was *totally unknown* to any of the physicians who came into contact with or treated the respondent.[34] As a logical or factual possibility, such policy could not have affected these physicians' medical judgments regarding respondent. The true bases for the medical judgments were the private ethical persuasions of the doctors as to how they will practice medicine and conduct their personal lives.[35] There was nothing illegal or morally reprehen-

[32] Petn. for Cert., App. p. A-31.

[33] See trial transcript of physicians' testimony at T. 85, 91, 94-95, 102 and 104, 113, 118-119; also *Plaintiff's Exhibit No. 2*, p. 7; also see physicians' affidavits in support of [Petitioners'] Motion for Summary Judgment (D.C. doc. ent. Nov. 1, 1974).

[34] Ibid., T. 97, 107-108, 118-119, 123.

[35] Petn. for Cert., App. p. A-21.

sible about this; and the City, if it was so inclined, would have been powerless to interfere. They ultimately came into conflict with respondent because of their disagreement with her insistence upon economic factors as indicative of abortion.

So it is also with the "staffing" premise of the Court of Appeals. The staffing situation which the lower court refers to, admittedly is an historical accident,[36] which if such question had been material and litigated in the trial would have appeared to be of an entirely different known character than as the Court of Appeals charges as intentional or wickedly accomplished[37] without any justification whatever, and without there having been any opportunity to refute.[38]

We respectfully urge that the factors isolated by the Court of Appeals is violative of respondent's rights to privacy under the Equal Protection Clause are insufficient to sustain such a result. The lower court's reasoning is in conflict with *Roe* and *Doe* in that it commands the institution by the City of an abortion service constitutionally incompatible with an independent medical decision regarding abortion, while objectively investing a woman with the right to an abortion for any reason she asserts. The factual bases underlying the Court of Appeals' reasoning are objectively in error and contrary to matters recognized as otherwise by *Roe* and *Doe*. Further, the Court of Appeals fails to apprehend and condition respondent's rights by those of the City as a dependent part of the State; and erroneously requires the City to establish a policy of favoritism toward abortion without permitting the City to balance and elect between its perception of public welfare, as far as medical services are concerned.

[36] See, e.g., Record, *Appellants' Brief Statement and Argument*, p. 18; C.A. 8th Cir., Case No. 75-1069.

[37] Petn. for Cert., App. p. A-30 (3rd par.).

[38] See Argument following; II Appellate Abuse of Discretion.

II. Appellate Abuse of Discretion

1. Overturning District Court's findings.

It is with great reluctance and genuine regret that petitioners level any complaint regarding the conduct of a United States appellate court. Fair and reflective litigants and their counsel appreciate that the courts universally attempt to do what is right and just within the law, and because the court adjudges matters adverse to one's views and interests is of no weight whatever in evaluating the court's rectitude as an institution for the administration of justice. But as valid and objective as these considerations are in all cases, there are highly infrequent instances where the court may depart from its proper role and thereby gravely affect, not merely the rights of parties, but more importantly in the overview, the administration of justice. On such rare occasions, fidelity to the courts themselves and to the process places a duty upon all concerned to bring such matters to the attention of higher authority. We say, unfortunately this is the present case.

Abortion is a matter that evokes substantial emotional and moral response and this case highlights such phenomenon. Concomitant with this factor, the Court of Appeals in attempting to do its duty as the tribunal of justice between the dedicated litigating parties and the just as partisan public bystanding interests, was required to operate in such environment. The Court composed of equally dedicated human jurists of high convictions could hardly be totally unaffected. We believe it was affected to such an extent as to vitiate the result of its whole proceedings. In saying this, we most quickly also positively and confidently assert that such effect was accidental, unintentional and wholly responsive to the majority members' conception of their duty. All said following is urged within this context.

The Supreme Court has the power under Article III of the Constitution and its Rule 19(b) to review the judicial procedures and conduct of the Court of Appeals in this case so as to determine whether that court, in the exercise of its adjudicatory powers, departed so far from common standards of fairness and impartiality of judicial practice and the positive postulates of the provisions of the Fifth Amendment and Fourteenth Amendment of the Constitution, and the requirements of Rule 52(a) of the Federal Rules of Civil Procedure, that judicial regularity was substantially and adversely offended, and the administration of justice vitiated in a grave matter vitally affected with the National interest.

We believe this Supreme Court's examination of the record of the whole of the proceedings in this case will result in its reversal of the decisions of the Court of Appeals because of such material departure from acceptable standards.

A common attribute of practically every stage of this case, that illuminates the great unfair damage done to petitioners by the Court of Appeals' treatment, is the unusual phenomenon that, from inception of the case almost to the day of trial before the District Court (e.g., Aug. 28, 1974) and after an intervening full-blown appeal before the Court of Appeals, the petitioners were attempting to find out or discover just what this case was about (D.C. doc. ent. 9-21-73). In the factual incidents recounted (with unquestionable documentation) it is seen that the identity of the respondent as well as all means of learning any specific factual matter were intentionally withheld from the petitioners by the respondent.[39] Coupled with this stratagem the petitioners were themselves pressed by their adversary to make admissions through answering interrogatories at a time when they knew virtually nothing about the case (D.C. doc.

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[39] This may have been an elective strategy of the respondent, but it none-the-less denied all access of discovery and meaningful defense.

ents. 9-12-73). Adding to this the respondent mightily pressed her unfair advantage by seizing the opportunity to press for very early summary judgment (D.C. doc. ent. 10-5-73), and in so doing, employed the deceptive tactic of utilizing an affidavit false in itself (and known to be false by respondent and her counsel) and highly deceptive as used in association with the adopted allegations of the Complaint (App. p. 37). The gravamen of the respondent's claim for right to summary judgment relied upon petitioners' answers to propounded interrogatories extensively dealing with the "Mayor's Policy" against elective abortions (App. p. 23). No question was propounded about or interest intimated by the respondent regarding "staffing procedures" or physicion procurement (D.C. doc. ent. 8-17-73). Throughout all stages of the litigation before respondent achieved appellate judgment on the *second* appeal, her tactic was to represent by express address to both the District Court and the Court of Appeals that a situation of great urgency existed for the respondent (D.C. doc. ents. 9-12-73; 9-19-73 and 10-2-73). The aforesaid false and deceptive proof she offered and her whole tactical approach clearly conveyed the impression that the respondent was in a maturing pregnancy condition and required judicial relief for expeditious abortion. However, at least very puzzling to petitioners (and we presume the courts) at the time, she never took those minimal and efficacious steps to alleviate such a represented situation through movement for relieving *pendente lite* orders of the court.[40] Much later we and the Court learned the reason—she had been aborted August 22, 1973.

With this situation pervading the case to just prior to trial on November 25, 1974, or precisely to August 28, 1974,[41] the

[40] Until October 11, 1974, the Complaint prayed for an injunction (D.C. doc. ent. 10-11-74).

[41] D.C. doc. ent. 11-25-74. Deposition of respondent accomplished on 8-28-74.

respondent only thereafter then exhibited an interest in the matter of the City's physician procurement for its hospitals. It is an irresistible conclusion that this interest resulted from the knowledge first gained by respondent from Petitioners' Motion for Summary Judgment served and filed November 1, 1974, with supporting affidavits of each of the physicians having anything to do with respondent that they neither knew of or in any way were influenced by the "Mayor's Policy." Naturally, such affidavit evidence utterly refuted the claim made up to such time that the City hospital staff physicians were interfered with or unconstitutionally controlled in their medical abortion decisions by the said policy; a strategic adjustment had become necessary. Such adjustment was attempted through the tactic of attempting to secure from the trial judge a pre-trial conference ruling that physician procurement was within the notice of the Complaint or the scope of the pleadings. This failed; but judge gave ample opportunity to respondent to bring such matter into the case through amended pleadings which she did not do. Rather, at the trial the respondent made several attempts to offer evidence she deemd appropriate to such issue and when repeatedly thwarted by the trial court, engaged in unavailing argument over the matter. The District Court after forcibly making its position clear to all parties, admitted some of such evidence for an altogether purpose (T. 57-58).

It is against this backdrop that the Court of Appeals' treatment of the case ought to be considered. Moreover, it could hardly be unknown, or as having failed to have been impressed upon that Court, since each incident was a matter of plain record, and the petitioners had expressly brought the matter to the attention of the Court of Appeals by a *highly unusual motion* bringing the conduct till such time before the Court and asking for protection against inadvertent decisional unfairness.[42] Additionally, in the first appeal[43] (spanning March

[42] See: App. p. 54; C.A. doc. ent. No. 7, 4-8-74.

[43] C.A. 8th Cir., Case No. 74-1232.

29, 1974, to June 4, 1974) the Court at such time inferentially construed the Complaint to relate only to the Mayor's Policy and gave no intimation of its much later post-trial construction of the phrase "procedure and practice" as including a claim directed at ideological physician procurement infirmities.[44]

Examination of the Court of Appeals' opinion of April 14, 1975,[45] gives a clear exposition of the way the reasoning of the Court of Appeals ignored this important history of the case, and which in legal effect, totally vitiated an extremely hard fought adversary trial and the District Court's decisional pronouncements upon the issues and proof actually before it.

Initially, the District Court, with unquestionable jurisdiction, exercised its discretion upon the facts before it including *all* the pleadings, remarks of counsel, and interpretation of all the then accrued history of the case (including the Court of Appeals' opinion on remand in Case No. 741,232), ruling that the City's hospital staff physician procurement history was not within the issues framed by the Complaint (T. 57-58; and 60-61). Acting upon such pre-trial determination the Court excluded such issue at trial; and what evidence putatively relating to such matters respondent offered, was only admitted for a totally foreign purpose, namely: whether the City's policy affected the physicians' decisions (*Ibid.*, T. 57-58; and 60-61). The transcript of the trial irrefutably demonstrates that the petitioners adapted themselves to this construction of the trial of issues and were not prepared or required to offer counter-evidence upon any other speculative, evidentiary implications that had been outlawed. In its *Memorandum and Order*[46] the

[44] Petn. for Cert., App. p. A-11, l.c. A-12, n. 1, A-14.

[45] Ibid., App. p. A-27.

[46] Ibid., App. p. A-19.

District Court decided the case in conformity to its pre-trial and trial rulings. Under the evidence the District Court decided that the respondent was demanding to be aborted by physicians who had determined that there were no indicating medical conditions; and on the issues found for the petitioners.[47]

The Court of Appeals first accurately construed the District Court's judgment saying:

> . . . The trial judge appears to have agreed with Doe [respondent] that there is a city policy prohibiting abortions, but he never considered the constitutionality of such policy because he felt that Doe had failed to establish that the policy had been applied to her. Instead, it was his opinion that Doe had merely been refused an abortion by certain physicians at the city hospitals obstetrics-gynecology clinic because of their own personal moral and ethical beliefs on that subject. We reverse.[48]

Thereafter *the appellate court found* a ". . . 'procedure and practice' which operates to bar the performance of abortions at the city's hospitals—the method of staffing the obstetrics-gynecology clinic." The Court explains this *finding* in a footnote No. 3.[49] The Court of Appeals gives no consideration whatever to the fact that the District Court had ruled that the case did not raise the issue of the City's staffing, or the resultant effect such a post-trial, very substantial alteration of the issues worked upon the petitioners. To accomplish this most unfair and damaging result the court (again from footnote No. 3) seized upon the two words "procedures and practices" apparently from paragraph "3" of the Complaint, and asserts:

[47] Ibid., p. A-25.

[48] Ibid., App. p. A-28.

[49] Ibid., App. p. A-30.

> . . . The complaint specifically mentions "procedures and practices" which thwart the performances of abortions as being under attack. . . .[50]

However, when the fair context of the paragraph of the Complaint from where the appellate court extracts these words is inspected, it is found that they plainly refer to something more substantial than an admittedly accidental, historical phenomenon which came into existence through a process of attrition over a period of years long before abortion became a constitutional right. If language has any approximate meaning these two words in context cannot be attenuated so far. Certainly the respondent could not have intended such a meaning since she included within the ambit of the paragraph "Homer G. Phillips Hospital" which she knew was not staffed by St. Louis University Medical School and offered to prove as much upon trial.[51] Then too the respondent's interrogatories and their answers exhibit this agreed meaning.

Much more direct and crucial, the District Court before and during the trial ruled the very question differently. If the Court of Appeals is permitted to reframe the issues after the trial and at such material prejudice to one of the litigants, the only and necessary effect will be to utterly destroy the control a trial court has over the conduct of its litigation. What party will accede to a ruling by the trial court if it is known to be meaningless on appeal and highly hazardous to rely upon at trial? Such a course is the very antithesis of judicial orderliness and fairness. In this instance, petitioners' reliance upon the proper office of the trial court and obedience to the court's rulings places them in the position of having a record barren of any refutation of the Court of Appeals' prejudicial conjec-

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[50] Ibid., App. p. A-30.

[51] T. 60-61; also see C.A. footnote recognizing the *hiatus* of proof: Petn. for Cert., App. p. 31, n. 5.

tures, where otherwise clear, compelling and indisputable refutation could have been produced. In a word, this in effect is "Trial by ambush."

Just as unwarranted is the Court of Appeals "finding" that the "policy" of the city operated (in combination with the staffing from St. Louis University) so as to result in: ". . . indigent pregnant women who desire abortions are unable to find a physician at the city OB-GYN clinic who will perform one . . ." The District Court, well supported by the evidence, found the opposite—that the policy had nothing to do with the respondent being refused an abortion; rather, it was caused by the sole judgment of the physicians who knew nothing about the policy.[52] In this connection it is indicative of the appellate court's use of evidence to note that it relies upon its observation that Doctor Wochner had been given the policy to carry out (Petn. for Cert., App. pp. A. 30 and 32) to support its conclusion that the policy was effective, and yet, the evidence is so clear and compounded that Doctor Wochner did virtually nothing effective to carry out such policy and the staff service physicians knew nothing of it![53]

Further, on appeal the Court awarded very substantial attorney fees to respondent against petitioner Poelker regardless of the fact that the *Complaint did not pray for such relief* and no consideration whatever was given such matter in the District Court. (And District Court awarded petitioners' judgment.) The basis for such award was placed upon the "private attorney general" doctrine. However, when petitioners reminded the Court of the controlling recent ruling of the Supreme Court obviating such awards in the circumstances of this case,[54] the

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[52] See C.A. construction of District Court's findings quoted supra, n. 38.

[53] T. 26-27, 49, 50, 85, 91-95, 101, 104, 108, 113-119.

[54] Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 420 (S.Ct. 1975).

awards were then made in like amounts upon a basis of petitioner Poelker's "bad-faith," likewise raised only on appeal by the Court, without any opportunity on the petitioner's part to defend against or refute such serious conviction.[55]

Similarly, even though the respondent had struck her prayer for an injunction before trial and such fact was the subject of particular dialogue in the Court of Appeals' hearing, none-theless the Court awarded an injunction to the respondent; and only withdrew such award after overruling respondent's motions for rehearing and rehearing *en banc* pointing out such fact. and then modifying its opinions.[56]

In engaging in these reformations of the District Court's proceedings which were well grounded in the record, the Court of Appeals gave no regard to rights of the petitioners to due process of law, or to the imperatives commanded by Rule 52(a). These appellate constructions of the pleadings and evidence could hardly be characterized as other than "appellate trial *de novo*." Certainly its conduct vitiated not only the judgment of the District Court, but more irregularly, the whole course of its lawful proceedings. It is patently evident that judgment and punishment was levied upon the petitioners in a proceeding wholly of the appellate court's design and in an unfair *ex parte* manner. The petitioners were not accorded those common postulates of decency surrounding due process of law, notice and opportunity to defend.

Likewise, the Court's disregard of Rule 52(a) is abundantly clear. Crucial findings of the District Court were *not* isolated by the respondent and shown to be "clearly erroneous." The Court of Appeals on its own motion undertook to substitute its "findings" without any deference to the commands of the Rule 52(a).

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[55] Petn. for Cert., App. p. A-44, et seq.

[56] *Ibid.*, App. p. 40, *et seq.*

The Court of Appeals attempts justification for its actions by referring to Rule 8(f), Rules of Civil Procedure, relating to construing pleadings so as to do substantial justice, and by its mystifying assertion that the petitioners could not claim surprise and ". . . did not ask for a continuance or attempt to offer any contrary evidence of [their] own . . ."[57] In view of the extensive circumstances of inequity toward the petitioners, not the least of which is the appellate reconstruction of the issues and trial, the application of such rule against petitioners is most unjust. The assertion imputing fair notice of the staffing issue, and the failure of the petitioners to offer contrary evidence or ask for a continuance is objectively incomprehensible and utterly lacking in rudimentary logic. As before pointed out at length, litigants have a lawful right to rely upon the rulings of the court conducting the trial. To embrace the reasoning of the Court of Appeals these petitioners would have had to set themselves against the lawful authority of the District Court and contemptuously disregard its orders and assaulted its dignity.

Of course, petitioners recognize and fully appreciate the existence of and necessity for an appellate court's broad discretion (co-extensive with that of trial court's), but such discretion is not an unlimited discretion, unfounded in reason or justification; to posit otherwise converts jurisprudence into a lottery. (*Singleton v. Wulff*, — U.S. —, 44 L.W. 5213).

Rule 52(a), Federal Rules of Civil Procedure, set the parameters within which the Court of Appeals should have proceeded. This rule commands that the District Court's findings ought not to have been set aside unless clearly erroneous, and that due regard was to be given to the trial judge's opportunity to judge the credibility of the witnesses. The Court of Appeals had no warrant to try the case *de novo*. *United States v. United States Gypsum Co.*, 333 U.S. 364, l.c. 395. The efficacy of the Dis-

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[57] Ibid., App. pp. A-30 to A-31, n. 4.

trict Court's inferences from undisputed basic facts (e.g., denial of abortion was a matter caused only by the independent judgment of the physicians) was to be respected by the Court of Appeals. There was no evidence of a "combination" with the policy. *Commissioner of Internal Revenue v. Duberstein*, 363 U.S. 278, l.c. 291. The Court of Appeals was required to indulge the District Court the presumption that its findings were correct and it was the duty of the respondent to clearly demonstrate error in such findings. This was not done. A reconstruction of the Complaint, after trial, does not satisfy this duty. Possibly no fairer statement of the position of an appellate court on review can be made than that of the Court of Appeals itself in *Pendergrass v. New York Life Insurance Co.*, 181 F.2d 136, l.c. 138 (C.A. 8th, 1950):

> The entire responsibility for deciding doubtful fact questions in a nonjury case should be, and we think it is, that of the district court. The existence of any doubt as to whether the trial court or this Court is the ultimate trier of fact issues in nonjury cases is, we think, detrimental to the orderly administration of justice, impairs the confidence of litigants and the public in the decisions of the district courts, and multiplies the number of appeals in such cases. * * *

The Court of Appeals has, until late, consistently adhered to its foregoing view of the meaning of the Rule 52(a) and expressly declared that it has no discretion to try a case *de novo; Parke-Davis and Co. v. Stromsodt*, 411 F.2d 1390 (C.A. 8th, 1969); *Birdwell v. Hazelwood School District*, 491 F.2d 490 (C.A. 8th, 1974).

This appellate course completely voided an adversary trial conducted below and put the Court of Appeals in the position of, once having materially changed the issues of a trial completed on another basis, trying the case anew without according petitioners any opportunity to meet such markedly changed situation.

2. Court of Appeals initiation of petitioner Mayor's conviction of "bad-faith" and imposition of punishment by levying "attorney fees."

Any question of petitioner Mayor's "bad-faith" and punishment therefor first arose and was decided against petitioner in the Court of Appeals. The issue was never raised in the District Court, no trial of such matters was there had and the District Court awarded judgment for the petitioners, against the respondent with prejudice. The Court of Appeals in its original opinion of April 14, 1975,[58] on respondent's suggestion in her brief, granted an allowance to her against Mayor Poelker of $3,500 for the "appellate portion" of the litigation, and also made an award in her favor against the Mayor for trial attorney fees, in an amount to be determined on remand of the outright reversal of the District Court. The stated basis for these awards was the appellate court's conclusion, that under its "equitable powers" such fees could be awarded because the respondent had acted as a "private attorney general." The Court specifically rejected respondent's suggestion of the alternative ground of bad faith (Ibid., App. A-37, n. 8).

Since there existed no statutory authorization for these Court of Appeals awards, and the matter was one not litigated below, petitioners moved the Court to strike such findings and the awards based on them, suggesting the applicability of the recent case of this Court, *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 420 (U.S.S.Ct. 1975), as controlling.[59] The

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[58] Petn. for Cert., App. p. 27.

[59] As above demonstrated, this was the second occasion petitioners were required to move the Court of Appeals to correct erroneous awards against them. Prior, on oral argument (second appeal) before Div. No. 2, upon one of the judges initiation of discussion of the nature of mandatory injunctive relief to be awarded against petitioners, petitioners there pointed to the record showing that the respondent had stricken her prayer for such relief and called

respondent concomitantly moved the Court to deny the motion and sustain the awards on the suggested bases of "willful violation of court orders" and the "bad-faith" of petitioner Mayor Poelker.

In response to petitioners' motion, the Court of Appeals again modified its opinion striking the awards of attorney fees on the basis of private attorney general but adopted the respondent's suggestion to make the same awards on the basis of "bad-faith" (Ibid., App. p. A-44).[60]

We urge that these judicial acts are without authority and constitute a flagrant abuse of discretion.

The stated ground for the conviction of petitioner Poelker of "bad-faith" and making the several awards as punishment, is the Court's supposition that the law was so clear after the United States Supreme Court decided *Roe v. Wade*, supra, and *Doe v. Bolton*, supra, in 1973, and the Court of Appeals had decided *Word v. Poelker*, 495 F.2d 1349 (C.A. 8th Cir., 1974) and *Wulff v. Singleton*, 508 F.2d 1211 (C.A. 8th Cir., 1974), that any defense against the respondent's claims (as reconstructed by the Court of Appeals) was frivolous and insubstantial, demonstrating:

> . . . a wanton, callous disregard for the constitutional rights of indigent pregnant women continuing long after those rights had been clearly enunciated by the Supreme Court in *Roe v. Wade*, supra, and *Doe v. Bolton*, supra . . .

upon her attorney to concede the same which he did. None-the-less, in its judgment the Court made such an award of injunctive relief. On petition for rehearing, the Court, *en banc*, on May 7, 1975, modified the divisional opinion so as to eliminate the terms "injunctive relief" at each occurrence and substitute therefor the words "declaratory relief" (Ibid., App. p. A-40).

[60] Presumably because of a total lack of any colorable foundation in the record for conjecturing "willful violation of court orders" (suggested by respondent), the Court makes no mention of such basis.

This is an untenable position. Neither *Roe v. Wade* nor *Doe v. Bolton* decided that municipal hospitals must furnish women "wishing" or "desiring" non-therapeutic abortions with physicians and facilities to carry out their wish. These Supreme Court decisions dealt with the resolution of a woman's personal right as measured against the State's rights under the criminal law. (The correlative rights of physicians were, of course, dealt within the same context.) These *Roe* and *Doe* opinions simply do not address the issue of municipal provision of physicians to perform abortions for either indigent women or women with means.

Further, at the times decisions were made or policies adopted by the petitioner Poelker as Mayor of the City of St. Louis, the whole of the Nation was in a confused and befuddled condition regarding the abortion situation. Beliefs and principles grounded in traditions, fundamental legal precepts, morality, and religious concepts were seen as being dealt devastating blows, not only by the *Roe* and *Doe* decisions, but even prior by the initiation and passage of new regulatory abortion laws such as in New York and Colorado. Litigation was multiplying without definitive decisional clarification in many secondary areas touched by *Roe* and *Doe*. The medical profession too was sharply divided and in a confused state regarding abortion. All of this is not to say that matters are now all resolved and clear, but only to indicate the context of the situation during the times immediaely prior and during the litigation of this suit.

These aforesaid factors are clearly evident in the record of this case. Note the testimonial references of Mayor Poelker and Doctor Wochner to meetings attempting to clarify and resolve the medical and legal problems surrounding the City's concern in the area of abortions (e.g., T-8-9. 21-26). Within this context the Attorney General of Missouri was defending the State's criminal abortion statutes,[61] and the State's legislature was in-

[61] Rodgers v. Danforth, 410 U.S. 949 (1973); and Danforth v. Rodgers, 414 U.S. 1035 (1973).

tensely engaged in legislative proceedings regarding abortion ultimately reaching this Court in *Planned Parenthood of Central Missouri v. Danforth*. The City itself considered and adopted abortion clinic regulatory ordinances; the first of which was litigated in *Word v. Poelker*, 495 F.2d 1349 (C.A. 8th Cir., 1974).

It would have been more understandable if the Court of Appeals had reasoned from these cases it cites by analogy to decide this case recognizing that the Supreme Court has not decided the question presented here; however, even such a course could not jurisprudentially excuse the Court of Appeals' abuse because the issue was *not* the meaning of *Roe* and *Doe* but the petitioner's "bad-faith" in not interpreting these cases as the Court of Appeals ultimately did! At the very least it can be said that reasonable men can differ on the application of *Roe v. Wade* and *Doe v. Bolton* to the present case. And if this be so it is manifestly unjust to convict a litigant for seeing the situation differently than the Court of Appeals.

Petitioners suggest that the rationale of the Court of Appeals can be understood and explained by the fact that the Court apparently thought that the issues of this case and those posed in *Nyberg*, supra, were identical. This became apparent at the hearing of the second appeal before that Court,[62] where a member of the Court expressed shock or dismay that its prior decision in the case sustaining the respondent's standing[63] did not cause the termination of the litigation. (The *Nyberg* case and the first appeal of this case were heard at the same sitting in succession.) Attempts by petitioner's counsel to clarify the distinctions between these two cases (and *Wulff v. Singleton*, supra, which a member of the Court stated flatly ruled the case) were

[62] C.A. 8th Cir. Case No. 75-1069.

[63] Ibid., Case No. 74-1232.

unavailing—actually appearing to incur the intense impatience of the Court.[64]

The Court of Appeals cites as additional evidence of petitioner's bad-faith its decision in *Wulff v. Singleton*, supra, as instructive of the law applicable to this situation and to be presumed known to the Mayor. The observation is as follows (Petn. for Cert., App. p. A-34), viz.:

> In the recent decision in Wulff v. Singleton, supra, 508 F.2d at 1215, the state of Missouri had by statute prohibited medicade payments to women receiving welfare benefits who had undergone nontherapeutic abortions while, at the same time, providing such payments to women welfare recipients who carried their pregnancies to term. This Court stated: "This classification is a clear violation of the Equal Protection Clause of the Fourteenth Amendment." *There is no practical distinction between that case and this one.* (Emphasis added.)

As can be seen and now is a matter of this Court's own history, the *Wulff v. Singleton* case involved construction of Title XIX of the Social Security Act; that is, Federally provided funds administered by the State. Not the question of *whether* the Federal or State government were constitutionally required to provide such funds for "indigent women." As a consequence, the analogy is rather distant from the case of whether a municipality must recruit complaint physicians for pregnant women "desiring" abortions. Further, the force of the Court of Appeals' reasoning as to clarity of the legal situation is all but destroyed by the express disagreement other United States Courts of Appeals have had with *Wulff v. Singleton*. In *Roe v. Ferguson*, 515 F.2d 279 (C.A. 6th Cir., 1975), the Court of Appeals for the Sixth Circuit, at 515 F.2d 284 of its opinion stated in part:

[64] Record, Transcript of Argument, C.A. 8th Cir., Doe v. Poelker, No. 75- 1069, submitted March 14, 1975.

> . . . We find ourselves, therefore, in disagreement with the Eighth Circuit's ruling in *Wulff v. Singleton*, 508 F.2d 1211 (8th Cir. 1974), that the unconstitutionality of this type of statute is so "obvious and patent" as to obviate the need for a three-judge court. . . .

The Second Circuit has also disagreed with the holding of *Wulff v. Singleton*. In *Roe v. Norton*, 522 F.2d 928, the Court observed that *Roe v. Wade*, supra, and *Doe v. Bolton*, supra, did not deal with the question of a State's right to restrict payments for abortions under social welfare programs such as Medicaid, and "despite lower court decisions holding such restrictions unconstitutional, it cannot be said that this issue has been put to rest by the Supreme Court." (522 F.2d 938). The Court (C.A. 2d Cir.) stated it agreed with the Sixth Circuit and disagreed with the Eighth Circuit on this question (522 F.2d 938, n. 15). Emphasis is added to the lack of "foreseeability" and obscurity of the law applicable to Mayor Poelker, by the Supreme Court's granting *certiorari* in *Wulff v. Singleton*, supra, and reversing and remanding for further hearing on the precise issue thought to so clearly be settled by the Court of Appeals (— U.S. —, 44 L.W. 5213).

Additionally, we urge that, these extremely complicated and subtle legal matters that courts and lawyers have experienced great difficulty with and have arrived at markedly varying views, ought not to be the basis of public castigation and severely punishing a public official not trained in law, but being unable to secure definite medical and legal guidance, relies upon his own conceptions of morality and decency. Even on strictly legal procedural precepts, Senior Judge Van Oosterhout dissented in this case against any award of attorney fees for conviction of "bad-faith."[65]

The reliance of the Court of Appeals on the several cases litigated in Missouri as a demonstration of the Mayor's ad-

[65] Petn. for Cert. App. p. A-51.

judicated "bad-faith" also fails upon objective inspection. *Word v. Poelker*, supra, and this case are cited to sustain such found history of "obstinancy." Of course, the Court's characterization of the Mayor's conduct is the very matter disputed here; but the case of *Word v. Poelker*, supra, merely involved the City's defense of an ordinance regulating (e.g., not prohibiting) abortion clinics. This could not with accuracy, be considered as evidence of a:

> . . . wanton, callous disregard for the constitutional rights of indigent pregnant women continuing long after those rights had been clearly enunciated by the Supreme Court Roe v. Wade, supra, and Doe v. Dalton, supra * * *

as found by the Court (Petn. for Cert., App. p. A-47). After the decision in the *Word* case, the Mayor approved a subsequent ordinance approved by the attorney for the plaintiff in *Word*.

Mr. Chief Justice Burger in *United States v. 12 200-Ft. Reels*, 413 U.S. 123, l.c. 127, gave pointed warning against too easy extension of a rule to new dissimilar situations:

> * * * The seductive plausability of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth "logical" extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance. This kind of gestative propensity calls for the "line drawing" familiar in the judicial, as in the legislative process: "thus far but not beyond."

The law declared by the Supreme Court does not seem, in rational application, to warrant the conviction of Mayor Poelker of bad faith and authorize such a severe condemnation and punishment.

It is clear and beyond cavil, that actual "bad-faith" practiced by a litigant in the course of litigation can be, and properly ought to be, punished. (*Aleyska Pipeline Service Co. v. Wilderness Society*, supra; and citations therein.) However, this laudable rule, under the perceived applications authorized by this Court, is not a device permitting arbitrary conviction and punishment without notice or hearing and capricious imposition for having a differing opinion in a new and very passion evoking field, or defending according to well recognized juridical norms.

The Supreme Court gave cogent evidence of the true meaning of the rule in *Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575 (S.Ct. 1964). There the Court equated "bad-faith" with contempt. The same gravamen of the offense is illustrated in the earlier case: *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399 (S.Ct. 1923). Particularly, in the *Universal Oil Products Co. v. Root Refining Co.* case the Court demonstrates its meticulous insistence that due process of law be accorded a person prospectively considered for punishment for "bad-faith."

Here we respectfully urge there are no facts relating to the conduct of the Mayor which could fairly be assayed as equivalent to a contemptuous disregard of the law; or an ignoring of anyone's rights under "ancient law" such as in *Vaughan v. Atkinson*, 369 U.S. 527 (S.Ct. 1962). Rather, there exists a *good faith* difference of opinion as to the law of this case, and an honest defense to contrary claims so that the matter can be resolved according to due process. In convicting petitioner Mayor Poelker of bad-faith and levying a heavy fine as punishment upon him as "attorney fees" in the course of an appellate proceeding, the Court of Appeals has deprived him of that most fundamental right under the Fifth and Fourteenth Amendments to the United States Constitution—due process of law.

This Court, representing the apotheosis and pride of our juridical system, must certainly recognize the great mischief a rule

such as has been adopted by the Court of Appeals portends. If allowed to stand one necessary effect must be a great deterrence against settlement of civil disputes peaceably in the courts where they belong. Then too officials of government will tend to be "chilled" or neutralized in the performance of their duties, conditioning their official acts upon an understandable overly cautious regard for their personal welfare. And, as is clear here, a justification of severe punishment for reliance upon great and broadly held concepts of morality, in principle, is contrary to and destructive of our Nation's dedication to individual responsibility, as we enforced at Nuremberg.

Finally, this Honorable Court cannot disregard the truth that this bedeviling question of abortion has assaulted our culture and divided our people as no other matter has since the War Between the States. At this juncture our people, political parties, and churches are deeply divided in the matter. It would be strange indeed if petitioner Poelker were not a part of this miliu. To interpret this as "bad-faith" is inaccurate and intemperate.

III. Justiciability, Standing and Mootness

Petitioners respectfully urge that the justiciable case or controversy requirements of Article III, of the United States Constitution, fully sustain the District Court's final determination of mootness under the facts of this case.

The salient facts material to this question are simple and uncontested. The respondent filed her suit on August 17, 1973, against the two petitioners, for a mandatory injunction requiring petitioners as the primary executive officers having control over the City's hospitals, to cause to be simultaneously performed on her an hysterectomy operation and an abortion of her pregnancy, and for a declaration of law of like settlement for all similarly situated members of a class.[66]

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[66] The likelihood of many women existing locally to satisfy such a class appears to be negligible, if not nonexistent.

The respondent, five (5) days after the filing of suit caused herself to be aborted (according to admission of counsel). No disclosure of such fact was made until six (6) months thereafter. The record is silent as to the occurrence of an hysterectomy as claimed to be simultaneously required by the Complaint.

At the time of the abortion of respondent on August 22, 1973, R. Dean Wochner, M.D., the second named petitioner, had not been served with a summons or the Complaint, and, of course, no responsive pleadings were required of either petitioner and no issues were as yet framed for trial.

The physiological fact of the abortion absolutely rendered the Complaint's prayer for respondent's personal abortion injunctive relief nugatory to try, and impossible for the Court to enforce, or the petitioners to obey. The only reason this anomalous status of the case did not timely appear was because of the respondent's imposed secrecy, her refusal to submit to discovery and a deceptive and false motion and affidavit she filed.

Upon challenge, these facts argue irresistibly against the respondent's Federal standing to sue. At the threshold, the words of Mr. Justice Reed, spoken for the United States Supreme Court in *United Public Workers v. Mitchell*, 330 U.S. 75, l.c. 89, are appropriate:

> As is well known the federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues "concrete legal issues, presented in actual cases, not abstractions," are requisite. This is true of declaratory judgments as any other field.

And in *United States v. Raines*, 362 U.S. 17, l.c. 21, the reiteration was couched:

> This Court, as in the case with all federal courts, "has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it: the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." Liverpool, N.Y. & P. S. S. Co. v. Commissioners of Emigration, 113 US 33, 39, 28 L ed 899, 901, 5 S Ct 352.

Standing to sue is a rational concept grounded in the imperatives of Article III of the Constitution and not a formal rule for administration of the Federal courts. As a substantive matter, going to jurisdiction, it must exist at each stage and throughout litigation of a case, although its aspects may vary or change during the progression of the case. As was said in *Flast v. Cohen*, 392 U.S. 83, l.c. 98, "Standing is an aspect of justiciability . . ." Determinations of Federal standing focus upon the status and character of the litigant and not the claims sought to be adjudicated. Or as put by Mr. Chief Justice Warren for the Court in *Flast v. Cohen* (392 U.S. 99):

> The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated. The "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." Baker v. Carr, 369 US 186, 204, 7 L Ed 2d 663, 82 S Ct 691 (1962). In other words, when standing is placed in issue in a case, the question is whether

> the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable. Thus, a party may have standing in a particular case, but the federal court may nevertheless decline to pass on the merits of the case because, for example, it presents a political question. A proper party is demanded so that federal courts will not be asked to decide "ill-defined controversies over constitutional issues," *United Public Workers v. Mitchell*, 330 US 75, 90, 91 L Ed 754, 768, 67 S Ct 556 (1947), or a case which is of a "hypothetical or abstract character." Aetna Life Insurance Co. v. Haworth, 300 US 227, 240, 81 L Ed 617, 621, 57 S Ct 461, 108 ALR 1000 (1937).

A generalized grievance or hypothetical vindication interest of a party is not enough to raise a constitutional duty for a Federal adjudication.

Further, it is abundantly clear that where the standing aspect of justiciability of a plaintiff ceases, the duty of a Federal court is clear. The case must be dismissed. Such a situation was squarely before the United States Supreme Court in *Golden v. Zwickler*, 394 US 103, where the plaintiff's relation to claims sought to be enforced (even though without any voluntary act of his own—contrary to the case here) changed to destroy standing. There the sequence of events unmistakably demonstrate that standing must exist throughout and not merely at the time of the filing of the Complaint. In the words of the Court (394 U.S. 108):

> The District Court erred in holding that Zwickler was entitled to declaratory relief if the elements essential to that relief existed "[w]hen this action was initiated." The proper inquiry was whether a "controversy" requisite to relief under the Declaratory Judgment Act existed *at the time of the hearing* on the remand. We now undertake that inquiry.

> "[T]he federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues, 'concrete legal issues, presented in actual cases, not abstractions,' are requisite. This is as true of declaratory judgments as any other field." United Public Workers of America v. Mitchell, 300 US 75, 89, 91 L Ed 754, 766, 67 S Ct 556 (1947). "The difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 US 270, 273, 85 L Ed 826, 828, 61 S Ct 510 (1941). (Emphasis added.)

At the conclusion of its opinion the Court again stresses this continuing requirement of standing in stating (394 U.S. 110):

> We conclude that Zwickler did not establish the existence *at the time of the hearing* on the remand of the elements governing the issuance of a declaratory judgment, and therefore that the District Court should have dismissed his complaint. We accordingly intimate no view upon the correctness of the District Court's holding as to the constitutionality of the New York statute. The judgment of the District Court is reversed, and the case is remanded with direction to enter a new judgment dismissing the complaint. (Emphasis added.)

For the sake of concentration on the precise issue, since the respondent was pregnant at the time of the filing of her Complaint, it would appear that, at least as to this factor, she was

possessed of standing at that time to seek an adjudication of her claims of infringements of personal constitutional rights as a *pregnant* woman seeking certain relief. Her personally sought redress was for a judicially coerced surgical operation upon her body for the removal of claimed diseased organs and destruction of the fetus in her uterus. Declaratory relief was incidental to and dependent upon such injunctive vindication.

However, the respondent caused her own abortion on August 22, 1973, at such early pre-trial time, she thereby completely obviated that "personal stake in the outcome of the controversy" and the quality of "sufficient immediacy and reality" to warrant any justifiable relief from the District Court. Of course, objectively the Court could not enforce her abortion: this she accomplished on her own. No judgment imposing such a duty on the petitioners to cause her abortion could have any real personal meaning for the respondent—her claimed legal relationship toward the petitioners had been irretrievably changed by her own doing. As far as her litigant status was concerned, the legal effect of her act in procuring an abortion was to destroy all possibility of ever establishing on hearing the fact of pregnancy upon which her claims depended. The effect could hardly be different in substance than a failure of proof on trial.

Just as in *Golden v. Zwickler* (394 U.S. 103, l.c. 109), where the Court pointed out that the situation giving rise to the complaint was most unlikely to ever recur (e.g., a judge resigning and again standing for election as a Congressman), here the respondent's pregnancy was past, and according to the recitals of her Complaint (p. 3, par. 11), the concomitant hysterectomy she had determined upon, forever destroyed any future possibility of recurrence.

It will be noted that the Supreme Court in *Roe v. Wade*, supra, cited *Golden v. Zwickler*, 394 U.S. 103, as particular authority in support of its determination that Roe's case was

possessed of the attributes of a Constitutional "case or controversy" and she was possessed of standing as late as May 21 (e.g., the day before trial) (410 U.S. 124). The patent holding in *Golden v. Zwickler* is the necessity of the existence of such a controversy at the time of the *hearing*—not at the time of filing. There can be no question whatever that *Golden* presented a case or controversy at the time of the filing, yet the decision of the Court was premised upon his standing *at the time of the hearing*—not the time of filing. (*Golden v. Zwickler*, supra, 394 U.S. 108 and 394 U.S. 110.) The litigant was held to have lost his admitted filing standing (i.e., "status") at the time of the hearing, and the case, in consequence, having lost its Constitutional case or controversy posture thereby.

It would appear just as compelling that when respondent lost her personal standing the class aspect of the suit was likewise vacated. Initially, respondent was the *sole* representative of a very nebulous class. Her person with its attendant personal characteristics gave justiciability to the suit. Once her status was changed, namely: no longer being pregnant and wanting an abortion and needing a hysterectomy, the case was without that "concrete adverseness" required for adjudicating the claims according to constitutional requirements of justiciability. *Baker v. Carr*, 369 U.S. 186, l.c. 204. As the Court instructed in *Baker v. Carr* (369 U.S. 208) justiciability demands more than "* * * merely a claim of 'the right, possessed by every citizen to require that the Government be administered according to law * * *.'" The corollary is, of course, "* * * federal courts are without power to decide questions that cannot affect the rights of the litigants before them." *North Carolina v. Rice*, 404 U.S. 244, 246. Of late the United States Supreme Court has had occasion to point out that the alleged rights of a class cannot survive a circumstance which renders the only part litigant's claim moot. *Indiana Employment Division v. Burney*, 409 U.S. 540. (See also: *Linda R. S. v. Richard D.*, 410 U.S. 614, and *Bailey v. Patterson*, 369 U.S. 31.)

The question of Federal standing has been the subject of United States Supreme Court consideration in the late abortion case of *Roe v. Wade*, 410 U.S. 113. There the Court considered the status of justiciability and standing of each party appellant according to their several, separate situations. Further, it is crucial to note that the Court makes a fundamental legal distinction in its analysis between *trial* standing and *appellate review* standing.

At the Court's division "A" of its opinion (410 U.S. 124) the Court first addressed appellant "Jane Roe's" standing. The Court reviewed the significant sequence of the progress of the litigation with respect to her and concluded as a matter of fact that she was pregnant at the time of the hearing before the trial court. The unquestionable fact of this observation is established by the following quotations of the Court's opinion (410 U.S. 124):

> A. Jane Roe. Despite the use of the pseudonym, no suggestion is made that Roe is a fictitious person. For purposes of her case, we accept as true, and as established, her existence; her pregnant state, as of the inception of her suit in March 1970 and *as late as May 21 of that year* when she filed an alias affidavit with the District Court; and her inability to obtain a legal abortion in Texas.
>
> Viewing Roe's case as of the time of its filing, *and thereafter until as late as May*, there can be little dispute that it then presented a case or controversy and that, wholly apart from the class aspects, *she, as a pregnant* single *woman* thwarted by the Texas criminal abortion laws, had standing to challenge those statutes. Abele v. Markle, 452 F2d 1121, 1125 (CA2 1971); Crossen v. Breckenridge, 446 F2d 833, 838-839 (CA6 1971); Poe v. Menghini, 339 F Supp 986, 990-991 (Kan 1972). See Truax v. Raich, 239 US 33, 60 L Ed 131, 36 S Ct 7 (1915). *Indeed, we do not read the appellee's brief as really asserting anything to the contrary*. The "logical nexus between the status asserted and the claim sought to be adjudicated." Flast v. Cohen, 392 US at 102, 20 L Ed 2d 947, and the necessary degree of contentiousness, Golden v. Zwickler, 394 US 103, 22 L Ed 2d 113, 89 S Ct 956 (1969), are both present. (Emphasis added.)

It can fairly be pointed out that in its canvass of the facts, the Court *found* that on May 21, 1970, which was the day before the trial hearing of May 22, 1970, Roe filed an affidavit of her *pregnancy*. The Court, absent any question about the matter, properly concluded it incredible that she was aborted over night especially where the trial record is silent regarding such a matter and the Court observes "Indeed, we do not read the appellee's brief as really asserting anything to the contrary * * *." (410 U.S. 124.)[67]

After so fixing the factual context of Roe's situation at (and after) the trial hearing, the Court then turned to a consideration of her *appellate* standing. The immediate cause of this inquiry was the appellee's suggestion that (410 U.S. 124) "Roe's case must *now* be moot because she and all other members of her class are no longer subject to any 1970 pregnancy." (The case was argued December 13, 1971, and reargued October 11, 1972.) After pointing out that "[t]he usual rule in federal cases is that an actual controversy must exist at stages of *appellate or certiorari review*, and not simply at the date the action is initiated * * *" (410 U.S. 125, emphasis added), the Court pointed out that pregnancy, because of its relatively limited duration, normally would not exist until the "appellate" process is completed. Because of this inexorable fact of life, the Court observed (410 U.S. 125) that "* * * If that termination makes a case moot, pregnancy litigation seldom will survive *much be-*

---

[67] Here the respondent procured her own abortion within five days of filing suit and before one of the two defendants was summoned.

yond the trial stage, and appellate review will be effectively denied * * *." (Emphasis added.) For this reason, coupled with the normal biological phenomenon that the *same woman* repeatedly experiences pregnancy, the Court applied the "Continuing Controversy Doctrine" to demonstrate the existence of standing and "non-mootness" at the *appellate review* stage. The familiar apothegm—"capable of repetition, yet evading review" —is declared for emphasis, and four cases are recited as supportive.

In addition to the fact that the Court is speaking strictly about standing at the *appellate* stage, several other observations are pertinent. It will be noted that the buttressing authorities cited by the Court each concern the question of "mootness" or "standing" only at the *appellate* stage. (410 U.S. 125.) No question of "trial standing" or "trial mootness" was raised by the parties contrary to here. Further, the decisional history of the "continuing controversy" exception relates to the *appellate* stage and not pre-trial situations. This is readily apparent from the long (and numerous) line of decisions dealing with the exception and its logical purpose. And, besides the Court expressly saying that it is dealing with mootness at the appellate stage, as before pointed out, at another part of its opinion when *sua sponte* discussing *trial stage* standing, it first finds the fact to be that Roe *was pregnant at trial* and cites prior decisions each requiring the actual status *at trial* to be as issuably pleaded in the Complaint as a basis for relief.

Here the doctrine of "continuing controversy" has no rational application. The question here is not respondent's *appellate* standing but her *trial* standing. There is no basis for or possibility of, "trial" of her Complaint as a pregnant litigant. This was absolutely foreclosed by her own voluntary act—*before trial*. The support the United States Supreme Court points out for the pregnancy of Roe at trial by her affidavit is, of course, nonexistent here. As a matter of fact the opposite is true for the

respondent's affidavit (in support of her motion for summary judgment) filed here, although at the time (October 5, 1973) apparently neither the District Court or petitioners noticed the absence of any positive recital of pregnancy such as was contained in the Complaint because of its otherwise false and deceptive nature.

Because of their use by the United States Supreme Court in the context of *trial standing*, the decisions cited in ***Roe v. Wade*** (410 U.S. 124) can be profitably referred to.

The first case cited is ***Abele v. Markle***, 452 F.2d 1121, l.c. 1125. This case markedly illustrates that in the context of contesting a claimed right to personal abortion, a woman must at least be pregnant. There the Court of Appeals said:

> Accordingly, we hold that non-pregnant female plaintiffs in this category do not show a sufficient nexus or present a sufficiently concrete issue in an adversary setting to give them standing, and we affirm the district court's dismissal of the complaint as to plaintiffs claiming standing solely on the basis of their child-bearing age.

At the outset the Court framed the issue of standing of the appellant lay women as a capacity to "present" a justiciable case (see: 452 F.2d 1124, para. 1-3). After receiving the controlling principles of "standing" and nothing that none of this class of women were pregnant (according to their Complaint and *affidavits*), the Court ordered that the trial court's dismissal be affirmed with leave to amend the Complaint, only to women who *are pregnant*. In this context it is helpful to be reminded that courts do not adjudicate pleadings but *cases*, and this was the actual effect accomplished.

Citation of this case in ***Roe v. Wade***, in the context of the Supreme Court's finding that "Jane Roe" was pregnant at trial, leaves no room for inference that the Supreme Court con-

sidered pregnancy at filing sufficient basis for standing where an abortion thereafter voluntary occurs before trial.

Crossen v. Breckenridge, 446 F.2d 833, is also consistent with petitioners suggested meaning of standing as explicated in *Roe v. Wade*. There the Court of Appeals of the case was within the frame of a denial of a complaint motion for appointment of a three-judge court by the District Court which determined a lack of standing and dismissed the complaint. As a consequence, the review of the appellate court was directed toward the record as it existed regarding the status of each party plaintiff at the time of the dismissal by the District Court. This status was solely and only discernible through inspection of the complaint since this was the extent of the record at the time bearing on each appellant's "personal stake and interest." (*Barlow v. Collins*, 397 U.S. 159.) The Court found that a pregnant woman (Pat Croddock) had standing, and a non-pregnant woman (Fran Pozzuto) lacked standing saying (446 F.2d 839):

> * * * It does not appear that this appellant presented more than hypothetical case to the district court. Her only connection with the asserted right of marital privacy is that she may become pregnant in the future. This is not a sufficient nexus to distinguish her from any other woman capable of bearing children. No injury is alleged, actual or threatened, other than the hypothetical possibility that she may be denied an abortion should she become pregnant. Accordingly we hold that appellant Pozzuto does not have standing to challenge the Kentucky abortion statute under the federal Constitution. * * *

The same rule was applied to a women's rights organization. Parenthetically it can be noted that the "class status" of the dismissed out appellants did not lend justiciability or standing.

The third case cited in *Roe v. Wade* is *Poe v. Menghini*, 339 F.Supp. 986. This case contains the flat statement that the

only two women involved as plaintiffs, Jane and Sally Poe, are "* * * at the time this action was commenced, were in need of abortions * * *" but unable to obtain them (339 F.Supp. 989). The trial court (three-judge Dist. Ct.) fully heard the case and its recital of the facts gives every indication of the pregnancy of these women at trial hearing. The relief prayed for included injunctive relief relating to the inability of the women to secure a local legal abortion. While the Court did not mandate any specific relief to insure abortion, its reason was clearly *not because of the absence of pregnancy* of the concerned plaintiffs, but because the Court, in view of its declarations, felt injunctive relief to be unnecessary because of the presumption the defendants would comply with the declaration. Consequently, the case stands for the proposition it was utilized for by the United States Supreme Court, namely: pregnancy at time of trial adjudication is a constitutional requisite for standing and justiciability.

The final case cted on the point by the Supreme Court in *Roe v. Wade* is *Truax v. Raich*, 239 U.S. 33, appears to be collaterally cited for its illustration of the approximity and facility of relief *pendente lite* to ensure the preservation of litigants' claimed constitutional rights until adjudication upon trial. Here, in this case, no temporary relief was prayed—no motion or other address to the trial court was made, because the actions of the respondent had rendered the matter hypothetical.

The pronouncements of the United States Supreme Court in *Roe v. Wade*, regarding the "Does" is contently equivalent to the here respondent's status than that of "Jane Roe." As is observed at "C" of the opinion (410 U.S. 127) "Mrs. Doe" who is not pregnant, and her husband asserted essentially the same claims as Jane Roe, but because of the wife's non-pregnant posture, relied upon present fear of future pregnancy without possibility of legal abortion as their basis for attack on the Texas statutes. The Court determined they lacked standing saying (410 U.S. 128):

> But we are not prepared to say that the *bare allegation* of so indirect an injury is sufficient to present an actual case or controversy. (Emphasis added.)

Respondent, at best, upon trial, could only have proved the future possibility of pregnancy, and, except for the deception practiced by respondent in hiding her non-pregnant status, her allegation of pregnancy in this Complaint could have been stricken on motion had it been known. Moreover, such disparity between proof and pleading, obviates the latter averment as a significant legal declaration thereafter. Permitting proof of a prior condition necessarily results in speculative declarations and advisory opinions.

It would seem to necessarily follow that if the Court of Appeals' concept of standing were rationally applied, any individual woman, who was pregnant at any time (after *Roe v. Wade*) and claimed to have been illegally denied an abortion would be vested with standing regardless of her *non-pregnant* condition at the time of *filing*. Such an individual would have the same claim of "injury" as respondent here and could present at least an equivalent "status" as the respondent under the Court of Appeals' reasoning, and could just as fully benefit by a declaration of her constitutional rights regarding an abortion even though it occurred before filing. Such a result is contrary to the unquestionable holdings in the cases cited by the Supreme Court in *Roe v. Wade*, supra, 410 U.S. 124, as authoritatively propounding the rule of lack of standing for non-pregnant litigants claiming constitutional infringement of rights to abortion, and is hostile to the general requirements propounded requisite to Article III justiciability.

As a consequence of the force of the authorities, it appears that respondent's standing to litigate in the constitutional sense, was terminated when she, within five (5) days after filing suit and before trial, voluntarily caused her pregnancy to be aborted, and the Court of Appeals was without jurisdiction to do other than affirm the District Court. Here standing and mootness are

companions ruled by the same factually destructive incident—self-procured abortion.

CONCLUSION

Petitioners urge that this Honorable Court, according to the requirements of Article III of the Constitution, ought to vacate the judgments of the Court of Appeals and remand with directions to enter an affirmance of the District Court's dismissal of respondent's case because of lack of standing to sue and mootness of the questions attempted to be presented by her.

In denying this, petitioners pray the Court to reverse the judgment, amendments to judgments and orders in Court of Appeals Case No. 75-1069, and Case No. 75-1648 and all subsequent orders thereon taken in effectuation of such judgments, because that Court, contrary to the holdings of *Roe v. Wade* and *Doe v. Bolton*, has adjudged that the petitioners must institute a City hospital service of "abortion on demand;" and reverse such Court of Appeals arbitrary awards of attorney fees as an abuse of discretion.

Respectfully submitted,

JACK L. KOEHR
City Counselor of the City of
St. Louis, State of Missouri

EUGENE P. FREEMAN
Deputy City Counselor of the City of
St. Louis, State of Missouri
Room 314, City Hall
1200 Market Street
St. Louis, Missouri 63103
(314) 453-3366
Attorneys for Petitioners

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IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1976

No. 75-442

JOHN H. POELKER, Mayor of the City of St. Louis, Missouri, and R. DEAN WOCHNER, M.D., Director of the Department of Health and Hospitals and Acting Hospital Commissioner of the City of St. Louis, Missouri,
Petitioners,

vs.

JANE DOE, *et al.*,
Respondents.

BRIEF FOR RESPONDENTS

FRANK SUSMAN
SUSMAN, SCHERMER, WILLER & RIMMEL
7733 Forsyth Boulevard—Suite 1100
St. Louis, Missouri 63105
(314) 725-7300
Attorneys for Respondents
On Behalf of the
AMERICAN CIVIL LIBERTIES UNION OF EASTERN MISSOURI
8011 Clayton Road
St. Louis, Missouri 63117
(314) 721-1215

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

INDEX

	Page
References to Reported Opinions Below	1
The Constitutional Provisions Involved	3
The Questions Presented for Review	4
A Statement of the Case	4
A. Chronology of Pleadings	4
B. Chronology of Facts	6
Summary of Argument	11
Introduction	11
Point 1—The Merits	11
Point 2—The Attorneys' Fees	12
Point 3—Respondents' Standing	12
Argument	13
I. Introduction	13
II. Point 1—The Merits	17
A. The Staffing Policy Was Clearly Within the Scope of Respondents' Pleadings	17
B. Case Law Precedents for Respondents' Position	21
C. The Fashioning of Appropriate Relief	28
D. Petitioners' Unmet Burden of Compelling Interests	31
E. Petitioners' Defense of Public Institutional "Conscience"	34
F. Abortion as a Legislatively Non-Favored Choice	36

G. The Imposition of an Unconstitutional Condition 43
H. The Socio-Economic Discrimination 45
I. Petitioners' Lament 54
III. Point 2—Respondents' Attorney Fees 55
IV. Point 3—The Standing of Respondents 58
Conclusion 66
Certificate of Service 67

TABLE OF CITATIONS

Cases

Abele, *et al.* v. Markle, *et al.*, 452 F.2d 1121 (2nd Cir. 1971) 61
Bigelow v. Commonwealth of Virginia, 421 U.S. 809 (1975) 13
Boddie, *et al.* v. Connecticut, *et al.*, 401 U.S. 371 (1971) 51
Brandenburger, *et al.* v. Thompson, *etc.*, 494 F.2d 885 (9th Cir. 1974) 58
Bullock, *et al.* v. Carter, *et al.*, 405 U.S. 134 (1972)..... 50
The California Bankers Association v. Schultz, *etc.*, *et al.*, 416 U.S. 21 (1974) 32
Coe, *et al.* v. Hooker, *et al.*, 406 F.Supp. 1072 (D.N.H. 1976) 37, 42
Crossen, *et al.* v. Attorney General of the Commonwealth of Kentucky, 344 F.Supp. 587 (E.D.Ky. 1972), vacated and remanded, 410 U.S. 950 (1973) 62
Crossen, *et al.* v. Breckenridge, *et al.*, 446 F.2d 833 (6th Cir. 1971) 61, 62

Doe v. Charleston Area Medical Center, Inc., *et al.*, 529 F.2d 638 (4th Cir. 1975) 37, 41
Doe v. Mundy, *et al.*, 514 F.2d 1179 (7th Cir. 1975) 28, 34, 38, 65
Doe v. Rampton, *etc.*, *et al.*, 366 F.Supp. 189 (D.Utah 1973) 37
Doe, *et al.* v. Bolton, *etc.*, *et al.*, 319 F.Supp. 1048 (N.D. Ga. 1970), affirmed, 410 U.S. 179 (1973) ..... *passim*
Doe, *et al.* v. General Hospital of the District of Columbia, *et al.*, 313 F.Supp. 1170 (D.D.C. 1970), remanded, 434 F.2d 423 (D.C.C. 1970) and remanded, 434 F.2d 427 (D.C.C. 1970) 26
Doe, *et al.* v. Hale Hospital, *et al.*, 500 F.2d 144 (1st Cir. 1974), cert. denied, 420 U.S. 907 (1975) 28, 32, 37
Doe, *et al.* v. Israel, *etc.*, 482 F.2d 156 (1st Cir. 1973), cert. denied, 416 U.S. 993 (1974) 63
Doe, *et al.* v. Myatt, *et al.*, —F.Supp. — (D.N.D. 1975).. 37
Doe v. Poelker, *etc.*, *et al.*, 497 F.2d 1063 (8th Cir. 1974) 2, 5, 57, 65
Doe, *et al.* v. Poelker, *etc.*, *et al.*, 515 F.2d 541 (8th Cir. 1975) 2, 5, 18, 20, 28, 35, 53, 55, 57, 58, 65
Doe, *et al.* v. Poelker, *etc.*, *et al.*, 527 F.2d 605 (8th Cir. 1976) 2, 6, 65
Doe, *et al.* v. Rose, *etc.*, 380 F.Supp. 779 (D.Utah 1973), affirmed, 499 F.2d 1112 (10th Cir. 1974) 37
Doe, *et al.* v. Scott, *etc.*, *et al.*, 321 F.Supp. 1385 (N.D. Ill. 1971), vacated and remanded *sub nom.* Hanrahan, *etc.* v. Doe, *et al.*, 410 U.S. 950 (1973) 60
Doe, *et al.* v. Westby, *et al.*, 402 F.Supp. 140 (D.S.D. 1975) 37
Doe, *et al.* v. Wohlgemuth, *et al.*, 376 F.Supp. 173 (W.D. Penn. 1974), affirmed on other grounds *sub nom.* Doe, *et al.* v. Beal, *etc.*, *et al.*, 523 F.2d 611 (3rd Cir. 1975) 37
Doe, *etc.* v. Ceci, *etc.*, 517 F.2d 1203 (7th Cir. 1975)..28, 38

Douglas, *et al.* v. California, 372 U.S. 353 (1963) 49, 50

Earley, *et al.* v. Di Censo, *et al.*, 403 U.S. 602 (1971) ... 38
Edwards v. California, 314 U.S. 160 (1941) 48
Eisenstadt, *etc.* v. Baird, 405 U.S. 438 (1972) 24, 37, 39
Elrod, *etc.*, *et al.* v. Burns, *et al.*, — U.S. — (1976) 33

Fairley, *et al.*, *etc.* v. Patterson, *etc.*, *et al.*, 493 F.2d 598 (5th Cir. 1974) 58
Franks, *et al.* v. Bowman Transportation Company, Inc., *et al.*, — U.S. — (1976) 65
Friendship Medical Center, Ltd., *et al.* v. The Chicago Board of Health, *et al.*, 505 F.2d 1141 (7th Cir. 1974), cert. denied, 420 U.S. 997 (1975) 37

Graham, *etc.* v. Richardson, *et al.*, 403 U.S. 365 (1971).. 53
Griffin, *et al.* v. Illinois, 351 U.S. 12 (1956) 48,50
Griswold, *et al.* v. Connecticut, 381 U.S. 479 (1965) 24, 39, 50, 51, 53

Hairston v. R & R Apartments, *et al.*, 510 F.2d 1090 (7th Cir. 1975) 58
Harper, *et al.* v. Virginia Board of Elections, *et al.*, 383 U.S. 663 (1966) 49, 50
Hathaway v. Worcester City Hospital, *et al.*, 475 F.2d 701 (1st Cir. 1973), stay denied, 411 U.S. 929 (1973) 25, 32

James, *etc.*, *et al.* v. Strange, 407 U.S. 128 (1972) 53

Klein, *et al.* v. Nassau County Medical Center, *et al.*, 347 F.Supp. 496 (E.D.N.Y. 1972), vacated and remanded *sub nom.* Ryan, *etc.* v. Klein, *et al.*, 412 U.S. 924 (1973), affirmed, 409 F.Supp. 731 (E.D.N.Y. 1976)..37, 38, 41, 60

Lindsey, *et al.* v. Normet, *et al.*, 405 U.S. 56 (1972) 52
Loving, *et ux.* v. Virginia, 388 U.S. 1 (1967) 51

Lubin v. Panish, *etc.*, 415 U.S. 709 (1974) 50

Matthews, *etc.* v. Eldridge, 424 U.S. 319 (1976) 31
McCabe v. Nassau County Medical Center, *et al.*, 453 F. 2d 698 (2nd Cir. 1971) 26
Meek, *et al.* v. Pittenger, *etc.*, *et al.*, 421 U.S. 349 (1975) 38
Memorial Hospital, *et al.* v. Maricopa County, *et al.*, 415 U.S. 250 (1974) 29, 32, 43
Meyer v. State of Nebraska, 262 U.S. 390 (1923) 39
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IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1976

No. 75-442

JOHN H. POELKER, Mayor of the City of St. Louis, Missouri, and R. DEAN WOCHNER, M.D., Director of the Department of Health and Hospitals and Acting Hospital Commissioner of the City of St. Louis, Missouri,
Petitioners,

vs.

JANE DOE, *et al.*,
Respondents.

BRIEF FOR RESPONDENTS

REFERENCES TO REPORTED OPINIONS BELOW

Since its inception on August 17, 1973, four District Court and three Appellate Court opinions have been rendered to date in this cause.

1. The first opinion of the United States District Court for the Eastern District of Missouri, Eastern Division, in *Doe*, et al. v. *Poelker*, etc., et al., in Cause No. 73C565(A), dated March 22, 1974, is unreported. It is reprinted in full in Petitioners'

"Petition for a Writ of Certiorari" (Pet. W.C.) at A-1 through A-10.

2. The District Court's first opinion, referred to in above paragraph 1, was reversed and remanded by the United States Court of Appeals for the Eighth Circuit on June 4, 1974 and the same is reported at 497 F.2d 1063 (8th Cir. 1974).

3. The District Court's second opinion in this cause, dated January 13, 1975, is unreported. It is reprinted in full in Pet. W.C. at A-19 through A-26.

4. The District Court's second opinion, referred to in above paragraph 3, was reversed and remanded by the Appellate Court on April 14, 1975, as modified on May 7, 1975 and on June 2, 1975. The opinion is reported at 515 F.2d 541 (8th Cir. 1975). The opinions of April 14, 1975 and May 7, 1975 are reprinted in full in Pet. W.C. at A-40 through A-42 and at A-44 through A-53, respectively.

5. The District Court's third opinion in this cause, dated August 8, 1975, is unreported. It is reprinted in full in Pet. W.C. at A-55 through A-59.

6. The District Court's third opinion, referred to in above paragraph 5, was reversed by the Appellate Court on January 5, 1976 and the same is reported at 527 F.2d 605 (8th Cir. 1976).

7. The District Court's fourth opinion in this cause, dated January 27, 1976, is unreported and has not been reprinted. This opinion is a *per curiam* order, complying with the Appellate Court's opinion referred to in above paragraph 6.

THE CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment to the Constitution of the United States:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Fourth Amendment to the Constitution of the United States:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment to the Constitution of the United States:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Ninth Amendment to the Constitution of the United States:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Fourteenth Amendment to the Constitution of the United States, in pertinent part:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

THE QUESTIONS PRESENTED FOR REVIEW

1. Did the Appellate Court Correctly and Properly Decide That Petitioners' Policies Violated the Standards of Equal Protection, as Constitutionally Afforded to Respondents?

2. Did the Appellate Court Correctly and Properly Award to Respondents Their Attorneys' Fees on the Basis of Petitioner Poelker's "Bad Faith"?

3. Did the Appellate Court Correctly and Properly Decide That Respondent Doe Had Standing on Her Own Behalf and on Behalf of Her Class?

A STATEMENT OF THE CASE

A. **Chronology of pleadings.**

On August 17, 1973 Respondents filed in said cause No. 73C565(A) their "Complaint for Declaratory Judgment and Injunctive Relief", seeking to obtain the free and ready availability of abortions within the confines of the St. Louis City public hospitals for women eligible for medical treatment there.

On March 22, 1974 the District Court entered its "Memorandum and Order" dismissing said cause for lack of Respondents' standing necessary to pursue the same, as a direct result of Respondent Doe then no longer being pregnant. "Notice of Appeal" to the Eighth Circuit was duly filed by Respondents on March 26, 1974 and the matter briefed and orally argued by both parties. On June 4, 1974 Respondents were held to have standing and this cause was "reverse(d) and remand(ed) to the district court for further proceedings consistent with the views expressed in this opinion and in our opinion in Nyberg v. City of Virginia, 495 F.2d 1342 (8th Cir. 1974)." *Doe* v. *Poelker*, etc., et al., 497 F.2d 1063, 1067 (8th Cir. 1974). Rehearing *en banc* was denied on June 27, 1974 and a request for stay, identified as cause no. A-1320, was denied by this Honorable Court on July 18, 1974.

On remand, a trial was held on November 25, 1974 and on January 13, 1975 the District Court entered its "Order" and "Memorandum and Order" dismissing said cause with prejudice. "Notice of Appeal" to the Eighth Circuit again was duly filed by Respondents on January 20, 1975. On April 14, 1975 this cause was reversed upon the merits. The policies of Petitioners, as to a blanket prohibition against abortions and as to the staffing procedures of the city hospitals, were both declared unconstitutional. *Doe*, et al. v. *Poelker*, etc., et al., 515 F.2d 541, 546 (8th Cir. 1975). Rehearings *en banc* sought by Petitioners were denied on May 7, 1975 and again on June 14, 1975. A request by Petitioners for a stay was denied by the Honorable Harry A. Blackmun on August 5, 1975 and a similar request by Petitioners for a stay was denied by the Honorable Lewis F. Powell, Jr. on August 26, 1975. Upon remand for award of attorneys' fees, trial was held on August 1, 1975 and the District Court entered its "Memorandum and Order" on August 8, 1975, refusing to award any fees. "Notice of Appeal" to the Eighth Circuit again was duly filed by Respondents on August 14, 1975. On January 5, 1976, the District Court was again reversed and

judgment entered for Respondents as to attorneys' fees. *Doe*, et al. v. *Poelker*, etc., et al., 527 F.2d 605 (8th Cir. 1976).

Petitioners' petition for a writ of certiorari was docketed on September 20, 1975 and review granted by this Honorable Court on July 6, 1976.

B. **Chronology of facts.**

On the day of filing her complaint, Respondent Doe was a resident of St. Louis, Missouri, and twenty-six years of age. She had two children at that time, a daughter seven years of age and a son nine years of age. (R. 62). She had no medical insurance coverage (R. 62-63) and held a city hospital clinic card. (R. 65). Additionally, she had experienced five prior miscarriages. (R. 63; Pls. Ex. 2, R. 37, 82).

Prior to August 7, 1973, her husband had been arrested and charged with a crime. (R. 63). She separated from her husband on or about February 1, 1974, almost ten months before the trial in this case. (R. 62).

Jane Doe suspected she was again pregnant in late July of 1973 because of a missed menses. (R. 64). She first visited the gynecological clinic of City Hospital on August 7, 1973. (R. 65). Although she could not recall the name of the "physician" whom she saw (R. 66), she specifically requested an abortion be performed at the city hospital. (R. 65-66). She was informed that an abortion was not possible because it was contrary to hospital policy. (R. 67). The "physician" referred her instead to the obstetrical clinic at city hospital and an appointment for August 13, 1973 was made. (R. 67).

The "physician" on this first visit of August 7, 1973, was Stephen Pandol, then a third year medical student at St. Louis University. (R. 83). His testimony does not contradict that of

Jane Doe and he stated that he had no recollection whatsoever of their conversation, other than as contained in the medical record itself (Pls. Ex. 2, R. 37, 82). (R. 88-89).

Jane Doe appeared at the appointment made for August 13, 1973, at the obstetrical clinic of City Hospital (R. 67) and spoke with Gregory Totel, then a third year medical student at St. Louis University. (R. 90). Mr. Totel informed Jane Doe of the positive results of her pregnancy tests (R. 93-94) and she requested an abortion at City Hospital. (R. 94). He found no medical indications for an abortion (R. 91) and such reasons, if existent, would have been "severe diabetes, a patient with a severe heart condition, something of that type." (R. 95). Mr. Totel indicated he had "personal convictions against the performance of abortions." (R. 95). He knew of no one at City Hospital to whom to refer Jane Doe,

> "(s)imply because all the people on our service for one reason or another did not engage in abortions . . . [for either] (p)ersonal or religious [reasons]." (Bracketed material supplied). (R. 97). (See, also, Pls. Ex. 2, R. 37, 82).

On August 14, 1973, Jane Doe returned to the hospital and spoke on that occasion with Dr. William J. Ott, from whom she again requested an abortion. (R. 68). Dr. Ott was then serving as chief resident from St. Louis University to the obstetrical service at City Hospital. (R. 99-100). Dr. Ott, because of his personal beliefs against abortion, even refused to provide her with a written statement as to the fact or stage of her pregnancy (R. 102), although Jane Doe stated to him her desire for an abortion. (R. 104). Dr. Ott further stated that he had received similar requests from patients desiring abortions at City Hospital and his response to such patients had always been the same. (R. 105-106). Dr. Ott referred Respondent Doe to Dr. Ziad Abu Dalu. (R. 102). Dr. Ott's medical opinion was that Jane Doe evidenced "no medical indications for termination of pregnancy" (R. 104); but as he stated, "as the professional the-

ories and education applied to me there are no indications for termination of pregnancy." (R. 109).

The last physician seen by Jane Doe was Dr. Ziad Abu Dalu, the physician to whom Dr. Ott referred her. (R. 69). She told Dr. Abu Dalu she desired an abortion at City Hospital and he responded it could not be done there. (R. 69, 112, 113). Dr. Abu Dalu saw Jane Doe again on August 15, 1973 and basically the conversation of the prior day was repeated. (R. 71, 72).

Dr. Abu Dalu found no "medical reasons" to justify an abortion for this patient (R. 113) and such reasons would be "(s)evere sickness of the patient, severe debilitating diseases that might affect the mother's health or jeopardize her life." (R. 120). He further did not refer her to another physician for the abortion "(b)ecause I wouldn't discuss it with any other physician. It's a matter of belief and a privacy between a doctor and a patient and I wouldn't push it to any other physician. It's unethical." (R. 120-121). Dr. Abu Dalu admitted he would refer any other "medical or surgical procedures" which he was "unable or unwilling to perform" to another physician. (R. 122-123).

Jane Doe was aborted by a licensed physician on August 22, 1973 at the facilities of Reproductive Health Services, a private medical clinic. (R. 74, 78, 80-81; Pls. Ex. 4, R. 79, 82).

There was vague testimony during trial about an additional obstetrical-gynecological service at City Hospital operated by Washington University Medical School, although this is directly contrary to Petitioner Wochner's statement that the service is staffed exclusively by St. Louis University. (R. 33). Dr. Frank Ostapowicz, Section Head of the Obstetrics and Gynecological Service at St. Louis University, referred to the same as existing "maybe in name only." (R. 41). Mr. Totel referred to the "theoretical existence" of another staffed service (R. 97), but knew of no physicians associated with the Washington University service. (R. 98). In the nine months of service spent by Dr.

Abu Dalu practicing in the obstetrical-gynecological department of City Hospital, he saw only physicians "known to (him) to be associated with St. Louis University." (Parenthetical material supplied). (R. 124). Lastly, Dr. Ott testified that all medical students at City Hospital Ob-Gyn Clinic are students at St. Louis University. (R. 107).

Respondent Doe's medical record indicates confirmed cervical fibroid tumors, polyps, vaginitis, erythema, trichomycosis and an extremely retroverted uterus. (Pls. Ex. 2, R. 37, 82).

Reverend Robert Brungs, S.J., a Jesuit priest and teacher at St. Louis University identified "plaintiffs' exhibit no. 3" as the existing "Faculty Manual of St. Louis University" (Revised September 1968). The exhibit provides on page 34 as follows,

> "(3) Causes of Termination of Tenured Appointment or of Non-Tenured Contracts During the Contract Period
>
> The University may institute procedures for the termination of tenured appointments or current contracts on the basis of the following causes:
>
> . . .
>
> (e) A grave offense in the discharge of University responsibilities, which is clearly against well-established principles of Catholic morality.[14]

[14] It should be noted that the offense must be committed during the discharge of University responsibilities. There is no reference here to the private and personal life of the faculty member. Examples of a grave offense committed in the discharge of University responsibilities would be the encouragement of sexual license in a student organization by its faculty moderator or the performance before students by a member of the Medical Faculty of an operation that, by Catholic standards, is clearly and gravely immoral." (Pls. Ex. 3, R. 55, 82).

Reverend Brungs testified that "By Catholic standards . . . the performance of an abortion before students by a member of the medical faculty (is) a clearly and gravely immoral act". (R. 58,

59). Dr. Ostapowicz similarly testified (R. 52) and indicated the Faculty Manual's application to the medical school faculty. (R. 50). "St. Louis University is a Jesuit institution" (R. 54); and as the District Court noted, "(i)t's certainly admitted St. Louis University is a Catholic institution" (R. 34) and "those people out there morally are not going to do it and won't do it." (R. 52).

Petitioner Poelker, Mayor of the City of St Louis, testified that Petitioner Wochner served as his appointee. (R. 3). Prior to and since April 5, 1973, Petitioner Poelker, through Petitioner Wochner, had enforced the policy that no abortions be performed within the city public hospitals unless "the life of the mother is in danger". (R. 6). The only stated reason for adoption of the policy by Petitioner Poelker was "my own personal conviction that abortion is murder". (R. 10). Both Petitioners Poelker and Wochner testified that the policy was enforced despite the fact that no investigations, studies or surveys were ever made in regard to: the possibility of providing abortions and the cost factors involved (R. 11, 28); the availability of appropriate facilities (R. 12, 28); the availability of trained, experienced or willing personnel (R. 12, 28, 29); the availability of arranging with a private medical facility to handle City Hospital patients (R. 13); or the effect of providing abortions on existing services presently offered (R. 39, 40). But for the directions of Petitioner Poelker, Petitioner Wochner, Director of Health and Hospitals for the City of St. Louis and Acting Hospital Commissioner for the City of St. Louis (R. 19, 22-23) would have provided abortions within the public hospital facilities. (R. 31).

The public hospital facilities did and do provide prenatal care, postnatal care, childbirth and delivery services, miscarriage treatment, dilitations and curettages (D's and C's), hysterectomies and hysterotomies. (R. 29). Petitioner Wochner further stated that the cost of providing early abortions was less than the cost of providing childbirth services (R. 30, 31).

Finally, Petitioner Wochner testified that not a single abortion had "been performed at the St. Louis public hospitals since January 1, of 1973 to date" (November 25, 1974). (R. 31).

SUMMARY OF ARGUMENT

Introduction

This Honorable Court's decisions in *Roe*, *infra*, and *Doe*, *infra*, were a medical blessing to women. Morbidity and mortality rates dropped significantly. Unfortunately indigent women have yet to share the benefits enjoyed by women of means. The denial of public hospital facilities for the performance of abortions has prevented indigent women from receiving from their primary and customary source of medical services the medical assistance which they desire and to which they are entitled.

Point 1

Both the arbitrary policy of Petitioner Poelker and the staffing policy of the public hospitals were within the scope of the pleadings, evidence and the courts' decisions. An unanimous line of public hospital and analogous medicaid cases have held the arbitrary exclusion of abortion from the full range of medical services provided, violates the equal protection clause. The state is not free to favor childbirth over abortion without the burden of showing a compelling state interest as justification.

The impact of such policies upon the public falls disproportionately upon the poor and engenders a second line of equal protection violation. Petitioners' policies are not protected by a state statute purporting to authorize public institutions to have a "conscience" policy against abortion. Nor may the state condition the receipt of medical service upon the surrendering of the fundamental choice to terminate pregnancy.

Point 2

The Appellate Court upon the basis of the record, Petitioners' voluminous pleadings and the uncontroverted trial testimony was in a position from the record before it to assess attorneys' fees against Petitioner Poelker on the basis of his "bad faith." The standard for review of such award is whether or not the Court of Appeals has abused its discretion. Clearly, it has not.

Petitioner Poelker throughout the course of this litigation has never once sought to justify his actions and admittedly acted out of an arbitrary, personal motivation. Petitioners' course of conduct before the courts is well documented and supports the award made.

Point 3

Respondent Doe both individually and on behalf of her class has adequate standing to maintain this action. Respondent's pregnancy at the time of filing her Complaint is the standard and her subsequent abortion prior to trial does not moot this action on her behalf nor on behalf of the class. The class nature of this action was recognized by the Court of Appeals during each of the three appeals taken during the course of the litigation. Numerous cases, including *Roe, infra,* and *Doe, infra,* hold that only pregnancy at commencement of suit is necessary and no cases exist to the contrary.

ARGUMENT

I. Introduction.

The plethora of medical and demographic benefits to women seeking abortions, since the availability of legal, medically performed services on a large scale post-*Roe* and *Doe*[1], have inured mainly to women of economic means. The central issue of this case involves the availability of public, government-funded hospitals as resources for abortion services to those women of limited means, who have always been by necessity the principal utilizers of such facilities. The policies of Petitioners in St. Louis, Missouri are repeated in other cities throughout this country and serve as the major encumbrance to women of the full exercise of this Honorable Court's rulings in *Roe, supra,* and *Doe, supra.*

The demographic and medical statistics of abortion have changed drastically since January 22, 1973. Abortion data is now "factual material of clear 'public interest' ".[2]

In 1972, a total of 586,760 legal abortions were reported to the federal Center for Disease Control, a total of 615,831 were similarly reported for the year 1973 and a total of 763,476 for the year 1974.[3] It is generally conceded that the Center for Disease Control count is low because many procedures go unreported, inasmuch as such reporting is not mandatory. A more accurate and comprehensive count, although again based only on procedures voluntarily reported by cooperating facilities, in-

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[1] *Roe,* et al. v. *Wade,* etc., 410 U.S. 113 (1973). *Doe,* et al. v. *Bolton,* etc., et al., 410 U.S. 179 (1973).

[2] *Bigelow* v. *Commonwealth of Virginia,* 421 U.S. 809, 822 (1975).

[3] *Center for Disease Control: Abortion Surveillance: 1974,* U.S. DEPT. H.E.W. (1976), at 14.

dicates 745,400 procedures for 1973 and approximately 900,000 for 1974.[4] The actual count for 1975 can safely be assumed to have exceeded 1,000,000 procedures.

Currently out of every 100 procedures in the United States: 1.5 patients were less than 15 years of age; 30.2 were between 15 and 19 years; 30.8 were between 20 and 24 years; 17.1 were between 25 and 29 years; and 17 were over 30 years of age.[5] Twenty-eight percent of the women were married and 72% were single, separated, divorced or widowed. Seventy-three percent were white and 27% were non-white.[6, 7]

The broad legalization of abortion has been reflected in other important statistical areas as well. Septic abortions in the municipal New York City hospitals decreased 43% from 1969 (before liberalization) to 1973 (three full years following liberalization).[8] A 60% and 70% drop were reported by New York's

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[4] Weinstock, *et al., Legal Abortions in the United States Since the 1973 Supreme Court Decisions,* 7 FAM. PLAN. PERSP. 23 (1975).

[5] *Legalized Abortion and the Public Health,* INSTITUTE OF MEDICINE: NATIONAL ACADEMY OF SCIENCES, Washington, D.C.: 1975, at 33.

[6] *Id.* at 36, 34.

[7] Statistics compiled on 18,000 procedures performed since May 1, 1973 by Reproductive Health Services in St. Louis, Missouri, the largest volume provider of services in the state, are similar. Two percent were less than 15 years of age, 15% between 15 and 17 years, 14% between 18 and 19 years, 34% between 20 and 24 years, 17% between 25 and 29 years, ten percent between 30 and 34 years, six percent between 35 and 39 years and two percent between 40 and 44 years. Seventy percent were white, 28% black, one percent Oriental and one percent other. Twenty-five percent were married, 57% single, 13% divorced, four percent separated and one percent widowed.

[8] *International Inventory of Information on Induced Abortion,* INTERNATIONAL INSTITUTE FOR THE STUDY OF HUMAN REPRODUCTION, Columbia University, New York: 1974, at 642.

Kings County and Harlem Hospitals, respectively.[9] A similar decline of 68% in San Francisco[10] and 77% in Los Angeles[11] were experienced in California following liberalization. It is not surprising that the number of patient-reported "spontaneous" abortions also reflected a 61% decrease.[12]

Maternal mortality rates have also been lowered. Abortion related deaths in New York fell 76% from before liberalization to the period of 1972-1974.[13] A similar drop of 63% occurred in California.[14] It should be noted that the mortality rate for abortions does not equal the rate of childbirth (using a conservatively low rate for the latter) until the 19th week of pregnancy gestation.[15] Compared to surgical mortality rates generally, legal abortion in the first trimester is almost twice as safe

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[9] Osofsky, *et al., The Abortion Experience,* Harper and Row, Hagerstown, Md.: 1973.

[10] Stewart, *et al., Therapeutic Abortion in California: Effects on Septic Abortion and Maternal Mortality,* 37 J. OBSTET. AND GYNECOL. 510 (1971).

[11] Seward, *et al., The Effect of Legal Abortion on the Rate of Septic Abortion at a Large County Hospital,* 115 AM. J. OBSTET. AND GYNECOL. 335 (1973).

[12] Goldstein, *et al., Trends in Therapeutic Abortion in San Francisco,* 62 AM. J. PUB. HEALTH 695 (1972). In Missouri, the statistics demonstrate a 62.5% decrease in women reporting a prior illegal abortion when comparing 1973 to 1975. (For source of information, see note 7, *supra.*)

[13] NATIONAL ACADEMY OF SCIENCES, *supra* at note 5, at 83.

[14] Goldstein, *supra* at note 12, at 695.

[15] NATIONAL ACADEMY OF SCIENCES, *supra* at note 5, at 75. When using the maternal mortality rate for 1970 of 26.8 per 100,000 births in the United States, the most recent year for which complete statistics are available; the rate is equal to that for an abortion performed well into the third trimester. *Vital Statistics of the United States (1973),* U.S. DEPT. H.E.W.

as a tonsilectomy and legal abortion in the second trimester is 29 times as safe as an appendectomy.[16]

Births of children by unmarried women have also dramatically decreased by a rate of 12% in states having enacted less restrictive abortion legislation after 1970.[17]

In addition to the myriad of reasons taken under consideration during the abortion decision-making process and previously delineated by this Honorable Court,[18] the increasing use of amniocentesis for the intra-utero determination of metabolic disorders has enabled parents to predetermine the presence of certain suspected chromosomal abnormalities. Nearly 60 such disorders are not potentially discoverable. Results of one study indicated that 64% of parents with one genetically defective child when faced with any risk greater than ten percent of having a second child similarly afflicted, elected not to repeat pregnancy.[19]

The threatened denial of access to public medical facilities for abortions would negate these documented benefits and these advances in the field of genetic counseling. To allow the doors of public hospitals, to be closed without reason to women seeking assistance, would effectively retract the long overdue recognition of women's reproductive rights enunciated in *Roe, supra,* and *Doe, supra.* Unquestionably, the result would be to compel women, and in particular indigent women, once again to seek out illegal avenues of treatment and to suffer the attendant higher incidents of mortality and morbidity inherent in such alternative.

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[16] Child, *Surgical Intervention,* LIFE AND DEATH AND MEDICINE, W. H. Freeman and Company, San Francisco: 1973, at 65.

[17] Sklar, *et al., Teenage Family Formation in Postwar America,* 6 FAM. PLAN. PERSP. 80 (1974).

[18] *Roe* at 153. *Doe* at 192.

[19] Carter, *et al., Genetic Clinic A Follow-Up,* 1 THE LANCET 281 (1971).

II

The Appellate Court Correctly and Properly Decided That Petitioners' Policies Violated the Standards of Equal Protection, as Constitutionally Afforded to Respondents.

This is not, as Petitioners would have this Honorable Court believe, a question of abortion on demand. (Pet. Br. at 32-51). Not a single abortion was performed in the St. Louis public hospitals between January 1, 1973 and October 16, 1975. The factors creating this deplorable situation were the expressed policy of Petitioner Poelker and the staffing policy of the City Hospitals. Both of these issues were clearly pleaded, presented, briefed, argued and decided in this cause.

A. The staffing policy was clearly within the scope of Respondents' pleadings.

Paragraph 3 of Respondents' "Complaint for Declaratory Judgment and Injunctive Relief," filed August 17, 1973, succinctly, although encompassingly, declared,

> "3. This is an action for a declaratory judgment and permanent injunction against the existence, application, implementation and enforcement of express and implied policies, rules, regulations, procedures and practices barring, thwarting, limiting and infringing upon the utilization of the personnel, facilities and services of the general, public hospitals of the City of St. Louis, Missouri, namely, Starkloff Memorial Hospital located at 1515 Lafayette within the City of St. Louis, Missouri and Homer G. Phillips Hospital located at 2601 Whittier within the City of St. Louis, Missouri, for the performance of abortions." (A. 7).

In no manner did Respondents at any time indicate or imply that the only thrust of their action was to void the un-

written oral statements of Petitioner Poelker, directing that abortions not be performed within the public hospital facilities of St. Louis, Missouri, unless medical indications necessary to preserve the life of the patient were indicated.

In fact, the evidence admitted at trial was directed in chief to the staffing policies at Starkloff Memorial Hospital, as well as to Petitioner Poelker's personal fiat. The issue was the non-performance of abortions for whatever reasons, not Petitioner Poelker's religious views.

It is clear that the District Court in its "Memorandum and Order" managed to sidestep entirely the policy of Petitioner Poelker, thereby avoiding any confrontation with and ruling upon said policy. The District Court accomplished this evasion by indirectly finding, although not directly stating, that the policy never applied to Respondent Doe. The District Court found instead that she was refused an abortion by each and every examining physician or medical student for alternative reasons of their own. 515 F.2d at 542. Thus, the District Court relied entirely upon the "personal standards" of the public hospital physicians as the basis for Jane Doe failing to receive abortion treatment; yet the District Court simultaneously refused to examine the pattern and substance of such standards applied to Respondent Doe as a basis for her constitutional claims.

The District Court stated,

> "THE COURT: We're not dealing with that. You're dealing with a policy. If you think under the pleading in the lawsuit I have that we're going to get into the staffing of those hospitals, you're just wrong. We're dealing here with the policy, and if you think that this Court under the pleadings that you have got here—if you want those things, if that's what you're trying to accomplish, and that's what I assumed that you were trying to do, you've got

> another lawsuit. Now, there's testimony in addition to that by one of the people you've got here that one of the sections down there is staffed by Washington University people. Now, you indicated in my office sometime that you wanted to do this. I can tell you in my judgment this lawsuit does not attack the staffing of those hospitals, does not require them to staff in a particular way. This pertains only to a policy that's laid down by the Mayor of the City." (R. 58).
>
> "THE COURT: There's no need to argue that. We've been down that before. I so indicated in the office that I don't understand them (the pleadings) to be so broad. I didn't understand that's what you even were asking for originally and I, in my judgment, if that's what you're after, that's a different ball game. . . . You're going to have to do that in another lawsuit, in my opinion." (Parenthetical material supplied). (R. 60-61).

Respondents from the beginning, since August 17, 1973, sought to challenge the systematic exclusion of all abortions within the public hospitals, regardless of the specific forms assumed by the various restrictive encumbrances, generated by Petitioners. Federal Rule of Civil Procedure No. 8(f) that, "(a)ll pleadings shall be so construed as to do substantial justice" further supports Respondents' contention. Petitioners had adequate notice from the pleadings and throughout the course of this litigation of the policies challenged and the ultimate relief sought by Respondents. Petitioners on no occasion claimed surprise during trial. To have required additional litigation to achieve the result which is constitutionally demanded herein, would have produced substantial justice for neither party. The staffing policy stands as an admitted fact in the record. Only issues of law attendant to it are in dispute.

As the Appellate Court noted,

"From exchanges which occurred during the trial it appears that the district judge thought the complaint was not broad enough to cover an attack on the staffing of the OB-GYN clinic. We disagree. The complaint specifically mentions 'procedures and practices' which thwart the performance of abortions as being under attack. The manner of staffing a hospital is certainly a 'procedure and practice' of that hospital. And, of course, any complaint must be read in the light of Fed.R.Civ.P. 8(f), which states that '(a)ll pleadings shall be so construed as to do substantial justice.'

"The city can hardly complain that it was surprised by the staffing issue in view of the broad wording of the complaint. It certainly knew that the gravamen was an attack on everything the city did which had the effect of keeping abortions from being performed in its hospitals. And when Doe put on evidence relating to staffing, the city did not ask for a continuance or attempt to offer any contrary evidence of its own." 515 F.2d at 543 at n. 4.

Petitioners never sought through pretrial discovery to ascertain the specific policies, practices or procedures under challenge by Respondents. In fact, the District Court never ruled prior to trial that Respondents could not attack the staffing policy. Evidence on such policy was repeatedly admitted by the District Court (R. 33, 41, 50, 52, 54, 58, 59, 97, 98, 107, 124) and the District Court stated the very essence of the staffing policy as fact (R. 34, 50-51). In its opinion, the District Court specifically ruled against Respondents on the merits of the staffing policy.

"In the instant case this Court is not presented with a request from any physician desirous of using the St. Louis City hospital facilities in order to perform an abortion upon his patient. Nor is there anything in the record to show that there is any physician presently on the staff

of either public hospital in St. Louis who is willing to admit the plaintiff as his patient for such a purpose. To the contrary, all of the medical personnel who examined plaintiff at Starkloff Hospital stated emphatically that they hold strong personal beliefs against abortion, and at one point plaintiff was told that there was no one to refer her to who was willing to perform such a procedure in the absence of any medical justification.

"In effect, plaintiff is asking this Court to hold that the City of St. Louis must provide someone to take care of any woman who requests an abortion at one of its hospitals. Such a holding would be clearly contrary to established constitutional principles, and this Court will issue no order designed to have such an effect." Pet. W.C. at A-25.

The Appellate Court merely took the legal issue of the Petitioners' staffing policy, erroneously decided by the District Court, and correctly reversed the legal conclusions reached by the District Court.

B. Case law precedents for Respondents' position.

Briefly, the merits may be stated as follows. On January 22, 1973 this Honorable Court rendered its historic decisions recognizing the constitutional right of women to terminate pregnancy in consultation with their physician. *Roe, supra,* and *Doe, supra.* It is difficult to recall other decisions of modern times which have had such a profound and intimate effect upon the lives of so many citizens of our country. Ironically, it is this very right which is invidiously being denied to women, particularly to indigent women, of the City of St. Louis, Missouri.

Although accused of "judicial legislation" by many, this Honorable Court in *Roe, supra,* was explicit and exacting as to

what states may and may not do to regulate the area of abortion. This Honorable Court very early in its decision stated,

> "The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient. . . . the State retains a definite interest in protecting the woman's own health and safety when an abortion is proposed at a late state of pregnancy." 410 U.S. at 150.

This Honorable Court continued,

> "As we have intimated above, it is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved." 410 U.S. at 159.
>
> "With respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now established medical fact, referred to above at p. 149, that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. . . .
>
> "This means, on the other hand, that, for the period of pregnancy prior to this 'compelling' point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State." 410 U.S. at 163.

Later, this Honorable Court repeated itself so as to make its dictates crystal clear,

> "To summarize and to repeat:
>
> . . .
>
> (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
>
> (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
>
> (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." 410 U.S. at 164-165.

Petitioners through their admitted, prohibitive policies and practices in regard to abortions, within the publicly maintained and publicly financed hospitals of the City of St. Louis have impermissibly intruded into the decision-making privacy and sphere of the indigent woman. This Honorable Court unequivocably denied to the state or those acting in its behalf the right to dictate medical policy and procedure in the constitutionally protected area of abortion, a right the Petitioners have blatantly usurped.

Petitioners, through their arbitrarily imposed and continued policies and practices, have attempted to dictate to Respondent and other members of her class, municipal decisions in regard to procreation and sexual mores. However, such decisions are

personal to be made by members of the class, as retained by and guaranteed to them by constitutional mandates. See: *Griswold*, et al. v. *Connecticut*, 381 U.S. 479 (1965); *Eisenstadt*, etc. v. *Baird*, 405 U.S. 438 (1972); *Roe, supra; Doe, supra;* and *Planned Parenthood of Central Missouri*, etc., et al. v. *Danforth*, etc., et al., — U.S. — (1976). This flagrant and unwarranted imposition of the moral values of an elected official upon all, without supporting rationale (R. 10-13), is constitutionally impermissible and its continued force and effect is intolerable.

Respondents do not contend that the staffing of the obstetrical and gynecological department of City Hospital by St. Louis University medical school faculty and students was originally designed to foreclose abortions to patients. Nevertheless, abortions without exception have been excluded partially by reason of the uniformity in the physicians' personally held moral or religious beliefs, attributable to their common association with St. Louis University. The pre-January, 1973 effect of such staffing on the unusually low rate of sterilizations performed and contraception prescribed there can also be statistically demonstrated. It is obvious that since January 22, 1973, Petitioners have continued to deal and to play their hand on this issue with a "stacked deck", by perpetuating staffing policies fully known to foreclose any possibility of abortions being performed in the public hospitals. See pages 9 and 10, *supra*.

To permit this situation to continue would not only have foreclosed the public hospital facilities to women seeking abortions; but would have served to encourage other public hospital facilities to accomplish similarly through this mode of indirection what they had failed, when attempted, to achieve directly.

One salient fact belies all of Petitioners' arguments. Not a single abortion had "been performed at the St. Louis public hospitals since January 1 of 1973 to date" of trial (November 25, 1974). (R. 31). Judicial notice and common knowledge as

to the prevalence of abortion dramatically illustrates the scope of the problem. See notes 3 and 4, *supra*.

It can not seriously be suggested that the obstetrical department at a public hospital could be staffed only by physicians who were strict adherents of "zero population growth"; and accordingly, who refused to render childbirth services to women who previously had borne two children.

The public hospital facilities do provide prenatal care, postnatal care, childbirth and delivery services, miscarriage treatment, dilitations and curettages (D's and C's), hysterectomies and hysterotomies. (R. 29). Petitioner Wochner further stated that the cost of providing early abortions was less than the cost of providing childbirth services (R. 30, 31).

Respondents contend that the burden in this cause has been misplaced by the District Court. Petitioners had admitted throughout this cause the existence of Petitioner Poelker's policy, the staffing policy of the obstetrical and gynecological service and the results, as evidenced in a total absence of abortions performed. (R. 31). The known existence of these policies dissuaded significant numbers of indigent women from even seeking or requesting abortions at the public hospital facilities.

As so aptly noted in *Hathaway* v. *Worcester City Hospital*, et al., 475 F.2d 701 (1st Cir. 1973), *stay denied*, 411 U.S. 929 (1973), the Court of Appeals, in voiding a city hospital policy prohibiting its facilities to be used for sterilization procedures, held,

> "The state interests, recognized by *Roe* as legitimate, are far less compelling in this context. Whatever interest the state might assert in preserving the possibility of future fetuses cannot rival its interest in preserving an actual fetus, which was found sufficiently compelling to outweigh the woman's interest only at the point of viability. The

state maintains of course a significant interest in protecting the health and life of the mother who, as here, cares for others whom the state might otherwise be compelled to povide for. Yet whatever health regulations might be appropriate to vindicate that interest, and on the present record we need not decide the issue, it is clear under *Roe* and *Doe* that a complete ban on a surgical procedure relating to the fundamental interest in the pregnancy decision is far too broad when other comparable surgical procedures are performed.

. . .

"*Doe* therefore requires that we hold the hospital's unique ban on sterilization operations violative of the Equal Protection Clause of the Fourteenth Amendment.

> "In so holding, we are not mandating the city or state to maintain this hospital, or to retain its present size, staff or facilities. The hospital is not required to perform all kinds of non-therapeutic or even all therapeutic surgical procedures. We are merely saying, consistent with the Supreme Court's reasoning in *Shapiro* with regard to welfare payments, that once the state has undertaken to provide general short-term hospital care, as here, it may not constitutionally draw the line at medically indistinguishable surgical procedures that impinge on fundamental rights." 475 F.2d at 706. See, also, *McCabe* v. *Nassau County Medical Center*, et al., 453 F.2d 698 (2nd Cir. 1971).

Similarly, is *Doe*, et al. v. *General Hospital of the District of Columbia*, et al., 313 F.Supp. 1170 (D.D.C. 1970), *remanded*, 434 F.2d 423 (D.C.C. 1970) and *remanded*, 434 F.2d 427 (D. C.C. 1970), in which the Appellate Court held that public hospitals could not constitutionally deny abortions to women seeking them. In *Nyberg*, et al. v. *The City of Virginia*, et al., 495

F.2d 1342 (8th Cir. 1974), *appeal dismissed for want of jurisdiction*, 419 U.S. 891 (1974), the Eighth Circuit noted,

> "The resolution prohibits the use of hospital facilities for the performing of any abortion which is not necessary to preserve the life of the mother. Because we find that the resolution unduly restricts what the United States Supreme Court has held to be a fundamental right, we are compelled to hold the resolution unconstitutional." 495 F.2d at 1343.
>
> . . .
>
> "The language of Roe v. Wade and Doe v. Bolton expressed the plain view that the abortion decision and its implementation is a fundamental right of personal liberty embraced within the Due Process Clause of the Fourteenth Amendment and is thereby protected from undue infringement by the State. In other words, absent compelling circumstances of state interest, regulation of 'certain fundamental rights,' including abortion, is unconstitutional." 495 F.2d at 1344-1345.
>
> "The trial court here, as did the First Circuit in *Hathaway*, felt required to hold that an outright ban on nontherapeutic abortions (Hathaway dealt with a municipal hospital's ban on sterilization operations) was unconstitutional under the teachings of *Doe* and *Roe*. We agree.
>
> "The record in this case demonstrates no compelling circumstances which would mandate this hospital's abortion restricting rules. Nothing on this record indicates that the performance of abortions will interfere with the normal hospital routine or require further staff and facilities. The ban on all abortions other than those to save the mother's life serves neither the hospital nor the state. Doe v. Bolton, *supra* at 198 . . . The sweeping hospital resolution in question here cannot withstand the constitutional

parameters framed by *Doe* and *Roe*. It would be a non-sequitur to say that the abortion decision and its effectuation is an election to be made by the physician and his patient without interference by the state and then allow the state, through its public hospitals, to effectively bar the physician from using state facilities to perform the operation." 495 F.2d at 1346.

The validity of a policy, practice, statute or ordinance, which results in the arbitrary exclusion of the medical procedure of abortion from the general field of medical services, provided at public facilities is patently and constitutionally defective. In addition to *Nyberg* and other cases cited *supra*, the identical question has been similarly answered in *Doe*, et al. v. *Hale Hospital*, et al., 500 F.2d 144 (1st Cir. 1974), *cert. denied*, 420 U.S. 907 (1975); *Doe* v. *Mundy*, et al., 514 F.2d 1179 (7th Cir. 1975); *Santiago* v. *Colon*, et al., (Unreported, D.P.R. No. 74-362, Aug. 6, 1974); *Orr*, et al. v. *Koefoot*, et al., 377 F.Supp. 673 (D.Neb. 1974); and *Roe v. Arizona Board of Regents*, et al., — Ariz. — (1976), 549 P.2d 150. See *Doe*, etc. v. *Ceci*, etc., 517 F.2d 1203 (7th Cir. 1975). For an insight into the background of an identical situation in Milwaukee, Wisconsin, see Ambrose, "*The Milwaukee Story*: *A Public Hospital's Resistance to the Supreme Court's Abortion Rulings*," 4 FAM. PLAN./POP. REPORTER 68 (1975).

C. **The fashioning of appropriate relief.**

The fashioning by the Appellate Court of appropriate relief (515 F.2d at 546), to include a positive duty upon Petitioners to make every and all reasonable efforts to obtain physicians willing to perform abortions and, in each and every other manner, to offer abortion services to women who desire them, consistent with the manner that other similar or corresponding medical services are provided, is not unique. Medical treatment

has been mandated under related circumstances to effect compliance with constitutional guarantees. See: *e.g.*, *Wyatt* et al. v. *Stickney*, etc., et al., 344 F.Supp. 373 (M.D.Ala. 1972); *Newman*, et al. v. *State of Alabama*, et al., 349 F.Supp. 278 (M.D. Ala. 1972); *Welsh*, et al. v. *Likins*, et al., 373 F.Supp. 487 (D.Minn. 1974); *Nelson*, et al. v. *Heyne*, et al., 491 F.2d 352 (7th Cir. 1974), *cert. denied*, 417 U.S. 976 (1974); *Memorial Hospital*, et al. v. *Maricopa County*, et al., 415 U.S. 250 (1974); and *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975).

The fact that the arrangement of staffing the obstetrical-gynecological department by St. Louis University personnel was instituted prior to January 22, 1973 does not excuse its continuation, when the patent and obvious effect is to deny to Respondent's class the right to constitutionally, protected medical services. The pre-existing nature of such circumstances has never justified its continuance, after the effective date of laws defining newly created legal rights or status. No legal right exists to stagnate.

In light of the total and glaring absence of justification offered by Petitioners for their policies, the validity of the same can not be sustained. The rationale of the then existing situation, as amply demonstrated by both the testimony of Petitioner Poelker and of Petitioner Wochner, set forth *supra*, not only was less than "compelling", but bordered on the non-existent.

The District Court in its "Memorandum and Order" cited *Roe*, *supra*, *Doe*, *supra*, and the opinion of the Appellate Court in *Nyberg*, *supra*, to reach its conclusion that,

> "In effect, plaintiff is asking this Court to hold that the City of St. Louis must provide someone to take care of any woman who requests an abortion at one of its hospitals. Such a holding would be clearly contrary to established

constitutional principles and this Court will issue no order designed to have such an effect." (Pet. W.C. at A-25).

With all due respect, Respondents suggest that the District Court and Petitioners have misinterpreted the true meanings of *Roe, Doe* and *Nyberg, supra,* and have chosen to apply an interpretation far stricter than that intended by this Honorable Court or by the Eighth Circuit, respectively. Respondents suggest that the passages cited by the District Court (Pet. W.C. at A-23 through A-25) were mere reaffirmations of this Honorable Court's holding in *Roe, supra,* that,

> "This means, on the other hand, that, for the period of pregnancy prior to this, 'compelling' point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated." 410 U.S. at 163.

The right of a hospital not to admit nor to treat any specific patient is only again a reaffirmation of the same principle, more explicitly stated in *Doe, supra,* that,

> "*Roe* v. *Wade, supra,* sets forth our conclusion that a pregnant woman does not have an absolute constitutional right to an abortion on her demand." 410 U.S. at 189.

It is one matter to acknowledge the right of medical institutions and medical personnel to make independent, concurring opinions as to the advisability of performing any specific and individual request for an abortion; and, on the other hand, to exaggerate out of proportion that right into the principle that *all* abortion requests can be denied in arbitrary fashion by a policy which has the inevitable effect of excluding any physician willing to perform a non-therapeutic abortion and of excluding all abortions regardless of physician willingness.

Respondents have the right to receive abortion services on a basis reasonably comparable with the standards and availability of other medical services offered in public hospitals. Admittedly, the physicians staffing the public hospitals in St. Louis and who had contact with Respondent Doe were of a predetermined mind and attitude in regard to abortion. They were morally opposed to abortion, made no effort to refer her to a physician of a different mind, were subject to loss of faculty appointment for assisting her and forbidden by mayoral edict from providing medical services, even had they desired to do so.

For the Petitioners to provide, as the Appellate Court required, abortion services in a similar manner as other pregnancy related services are provided, consistent with equal protection standards, is not synonymous with abortion on demand exclusive of medical consultation and concurrence, as Petitioners so erroneously argue.

Respondents have been denied the "routine, standard, and unbiased medical reports by physician specialists" envisioned by this Honorable Court in *Richardson,* etc. v. *Perales,* 402 U.S. 389 (1971) and *Matthews, etc.* v. *Eldridge,* 424 U.S. 319 (1976).

D. Petitioners' unmet burden of compelling interests.

Threatened here is the right of privacy which originated with *Union Pacific Railway Company* v. *Botsford*[20] and in the present context of procreation is "founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action."[21]

This Honorable Court has clearly recognized that the burden of justifying the type of state action challenged here, which in-

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[20] 141 U.S. 250 (1891).

[21] *Roe* at 153.

fringes upon the right of a woman and her physician to terminate a pregnancy, lies heavily upon the Petitioners.

> "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest.' "[22]

This principle is particularly applicable when "one's beliefs, ideas, politics, religion, cultural concerns, and the like"[23] become involved; a situation present at bar.[24]

> "Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty."[25]

Petitioners never sought to justify their position and, in fact, their testimony set out, *infra*, negates any such rational justification. Rather, Petitioners have sought to avoid any direct confrontation with the merits or with the validity of their actions. The correctness of the "compelling state interest" standard has been recognized in identical factual situations by the First[26] and Eighth[27] Circuits.

Durational residency requirements for free medical care have also been held to the standard of "compelling state interest."[28]

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[22] *Roe* at 155. See, *Paris Adult Theatre I*, et al. v. *Slayton*, etc., et al., 413 U.S. 49, 65 (1973).

[23] *The California Bankers Association* v. *Schultz*, etc., et al., 416 U.S. 21, 86 (1974).

[24] See, Gelinas, "Roe *v.* Wade *and* Doe *v.* Bolton: *The Compelling State Interest Test in Substantive Due Process*," 30 WASH. & LEE L.REV. 628 (1973).

[25] *O'Connor* v. *Donaldson*, 422 U.S. 563, 575 (1975).

[26] *Hathaway*, *supra*, 475 F.2d at 705; and *Hale Hospital*, *supra*, 500 F.2d at 147.

[27] *Nyberg*, *supra*, 495 F.2d at 1345.

[28] *Memorial Hospital*, et al. v. *Maricopa County*, et al., 415 U.S. 250, 254 (1974).

While this axiom of the heavy burden upon the State to justify legislative interference with the fundamental right to an abortion is capable of being succinctly stated; its importance should not be overshadowed by its brevity or clarity. Petitioners herein have failed to demonstrate and to prove, much less even to suggest, any interests which approach the level of the interests of a woman seeking abortion. No interest even of a rational nature has been offered. Instead, Petitioners have devoted their efforts during three years of litigation to obfuscating or procedural ploys.

It is difficult to refute Petitioners' justifications for its policies, inasmuch as the same have never been clearly set forth at any stage of this litigation.

Petitioners appear to assume that any abortion which does not threaten the life of the patient is not medically or otherwise necessary.

Petitioners further appear to assume that a medical determination as to the advisability of abortion by a slate of physicians morally, religiously and/or contractually opposed to abortion is an objective and unbiased basis of medical treatment.

Both assumptions defy fact and reason and fly in the face of this Honorable Court's own observation that the medical decision of abortion involves emotional, psychological, physical, economic, social and familial factors. *Roe* at 153. *Doe* at 192.

The corollary to the "compelling state interest" requirement, "that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake" (*Roe* at 155) has never been applied here; again, inasmuch as Petitioners have never asserted a single justification for the policies promoted and it is the "Government's burden to demonstrate an overriding interest in order to validate an encroachment on protected interests . . .". *Elrod*, etc., et al. v. *Burns*, et al., — U.S. — (1976).

E. **Petitioners' defense of public institutional "conscience".**

The issue of Missouri Revised Statute, Section 197.032, erroneously raised by the District Court in its "Memorandum and Opinion" (Pet. W.C. at A-22) and by Petitioners (Pet. Br. at 42), was adequately dealt with in *Doe* v. *Mundy*, etc., et al., 514 F.2d 1179, 1182 (7th Cir. 1975), where the Appellate Court stated,

> "First, defendants argue that since the hospital's policy was promulgated under an enabling state statute, the plaintiffs are attempting to enjoin operation of the statute itself without convening of the three-judge court required by 28 U.S.C. § 2281. The statute, Wis. Stat. § 140.42, reads in its relevant part:
>
> > '(1) No hospital shall be required to admit any patient or to allow the use of the hospital facilities for the purpose of performing a sterilization procedure or removing a human embryo or fetus.'
>
> Defendants' argument must fail because plaintiffs do not seek state-wide injunctive relief against the operation of a statute; they seek only to enjoin the enforcement of one hospital's rule. Although the conclusion that the statute is unconstitutional may logically follow from the ruling of the District Court, this result does not mean a three-judge court is required. Our conclusion is supported by McCrimmon v. Daley, 418 F.2d 366, 368-369 (7th Cir. 1969), which held that the granting of injunctive relief against the operation of a city ordinance promulgated under a state enabling statute did not require the convening of a three-judge court."

Similarly is the Appellate Court's discussion of the same issue below.

> "The city urges as a defense that its policy and staffing were authorized by Mo. Rev. Stat. § 197.032. . . .

> "Doe does not attack this statute in the instant litigation. None the less, there is no merit to the city's argument. The city's policies and acts must be judged against the Federal Constitution in this action under 42 U.S.C. § 1983. . . .
>
> "It may appear to follow logically from our holding in this case that the Missouri statute is unconstitutional." 515 F.2d at 545-546 at n. 7.

As recently noted by the Sixth Circuit,

> "However, the conscience clause cannot constitutionally permit 'public' hospitals ('state actors'), to refuse to permit the performance of abortions for 'ethical' reasons. Such permission would circumvent, if not directly contravene, *Roe, supra*, 410 U.S. at 164-165, 93 S.Ct. at 732, 35 L.Ed.2d at — , which permits the state to interfere with the woman's abortion decision only in the second trimester, and then only to protect maternal health, and in the post-viability stage, to protect maternal health and fetal life. The conscience clause, as applied to public hospitals, unconstitutionally interferes with the woman's constitutional right to abortion by permitting public hospitals to proscribe first trimester abortions and to proscribe second trimester abortions on grounds broader than 'maternal health.' . . .
>
> "We agree with *Hathaway, supra*, and *Nyberg, supra*, that certain *Bolton* language cannot shield the 'institutional conscience clause,' as applied to public hospitals, from constitutional challange. Admittedly, *Bolton* favorably cited a facially unlimited Georgia 'institutional conscience clause,' but the Court quickly noted the clause was 'obviously' designed 'to afford appropriate protection to the individual and to the denominational hospital.' 410 U.S. at 197-198, 93 S. Ct. at 750, — L.Ed.2d at — . *Hathaway* noted that the reference to the Georgia clause 'cannot,

of course, be taken as approving a similar ban in a state or state-supported hospital, . . . subject to the First and Fourteenth Amendments. . . .' 475 F.2d at 706 n. 4. Accord, *Nyberg, supra,* 495 F.2d at 1346-1347.

A more narrowly drafted 'conscience' clause, however, would presumably be constitutional if limited to permitting public hospitals to refuse to allow post-viability abortions for the 'ethical . . . interest in the potentiality of human life . . . except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.' " *Wolfe,* et al. v. *Schroering,* etc., et al., — F.2d — (6th Cir. 1976).

The District Court threatened to delay the trial by certifying the case as one requiring a statutory three-judge panel on the basis of the affirmative defense raised by Petitioners as to Mo. Rev. Stat. § 197.032 (A. 16-17, 22-23). To avoid further delay, despite the obvious error of the District Court's reasoning, Respondents had no alternative but to amend their Complaint by deletion of the request for injunctive relief in order to avoid the language of 28 U.S.C. § 2281, as interpreted by the District Court.

F. **Abortion as a legislatively non-favored choice.**

Specific state schemes, which unconstitutionally favor a woman's election to carry a pregnancy to term as opposed to terminating the pregnancy, have consistently been invalidated by the courts.

Roe clearly held that the decision to abort was a matter of privacy encompassed within the spectrum of a fundamental right.[29] Where fundamental rights, involving abortion[30] or

[29] *Roe* at 155.

[30] *Doe* at 194.

other forms of contraception,[31] are involved, "it is impermissible to treat differently two classes which do not differ on any ground related to the purpose of the challenged statute."[32]

The invalidity on equal protection grounds of policies which favor childbirth over abortion has been adopted in the analogous line of authority voiding Medicaid statutes which exclude payment for abortion[33] and identical cases voiding public hospital policies which exclude abortion procedures.[34]

As so aptly stated by the first court to examine the issue,

"The pregnant woman may not be denied necessary medical assistance because she has made an unwarrantedly dis-

[31] *Eisenstadt,* etc. v. *Baird,* 405 U.S. 438, 453 (1972).

[32] *Friendship Medical Center, Ltd.,* et al. v. *The Chicago Board of Health,* et al., 505 F.2d 1141, 1152 (7th Cir. 1974), *cert. denied,* 420 U.S. 997 (1975).

[33] *Klein,* et al. v. *Nassau County Medical Center,* et al., 409 F. Supp. 731, 733 (E.D.N.Y. 1976); *Doe,* et al. v. *Rose,* etc., 380 F. Supp. 779, 781 (D.Utah 1973), *affirmed,* 499 F.2d 1112, 1114 (10th Cir. 1974); *Doe* v. *Rampton,* etc., et al., 366 F.Supp. 189, 192 (D.Utah 1973); *Doe,* et al. v. *Wohlgemuth,* et al., 376 F.Supp. 173, 177-178 (W.D.Penn. 1974), *affirmed on other grounds* sub nom. *Doe,* et al. v. *Beal,* etc., et al., 523 F.2d 611 (3rd Cir. 1975); *Doe,* et al. v. *Westby,* et al., 402 F.Supp. 140, 144 (D.S.D. 1975); *Wulff,* et al. v. *Singleton,* etc., 508 F.2d 1211, 1215 (8th Cir. 1974), *reversed and remanded on other grounds,* — U.S. — (1976); *Doe,* et al. v. *Myatt,* et al., —F.Supp. — (D.N.D. 1975); *Planned Parenthood Association,* et al. v. *Fitzpatrick,* et al., 401 F.Supp. 554, 580 (E.D.Pa. 1975), *vacated and remanded on other grounds,* — U.S. — (1976). See, also, *Coe,* et al. v. *Hooker,* et al., 406 F.Supp. 1072, 1080 (D.N.H. 1976), holding that statutory requirements mandate medicaid payments for abortions because,

"These statutory limitations, especially the equality and the arbitrary denial provisions are essentially the same as constitutional guarantees. Medicaid recipients are thus statutorily guaranteed equal protection and due process of the law."

[34] *Nyberg, supra,* 495 F.2d at 1346; *Hale Hospital, supra,* 500 F.2d at 146; *Doe* v. *Charleston Area Medical Center, Inc.,* et al., 529 F.2d 638, 645 (4th Cir. 1975); *Santiago* v. *Colon,* et al. (Un-

favored choice, and no other basis appears here for denying medical assistance."[35]

The economic "medical assistance" which formed the basis for unconstitutional discrimination by the state in *Klein, supra,* is indistinguishable from the discriminatory policy encumbrances in the present cause. The form of the assistance, whether as monies, facilities, supplies, personnel, *etc.* is not a constitutionally controlling distinction. This has been the clear lesson in cases involving government aid to private denominational schools.[36] In each of the challenged policies in this cause, the Petitioners dramatically have preferred childbirth over abortion by encumbering in discriminatory fashion the latter.

As the Court in *Klein, supra,* went on to note,

"Beyond that, it may well be that a still more fundamental right is infringed whenever an attempt is made by statute or rule to deny, or, as here, substantially to interfere with, the pregnant woman's interests in freely determining whether or not to bear a child."[37]

The herein challenged policies deny to pregnant women desiring to abort the equal protection of the laws to which they

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reported, D.P.R., No. 74-362, Aug. 6, 1974); *Orr,* et al. v. *Koefoot,* et al., 377 F.Supp. 673, 681-684 (D.Neb. 1974); and *Roe* v. *Arizona Board of Regents,* et al., — Ariz. — (1976), 549 P.2d 150. See, also: *Doe* v. *Mundy,* et al., 514 F.2d 1179 (7th Cir. 1975); and *Doe,* etc. v. *Ceci,* etc., 517 F.2d 1203 (7th Cir. 1975).

[35] *Klein,* et al. v. *Nassau County Medical Center,* et al., 347 F. Supp. 496, 500 (E.D.N.Y. 1972), *affirmed on remand,* 409 F.Supp. 731 (E.D.N.Y. 1976).

[36] *Sloan,* etc., et al. v. *Lemon,* et al., 413 U.S. 825 (1973) (monies); *Tilton,* et al. v. *Richardson,* etc., et al., 403 U.S. 672 (1971) (facilities); *Meek,* et al. v. *Pittenger,* etc., et al., 421 U.S. 349 (1975) (supplies); and *Earley,* et al. v. *DiCenso,* et al., 403 U.S. 602 (1971) (personnel).

[37] *Klein, supra* at n. 35.

are constitutionally entitled. They alone are subjected to economic coercion to bear children, which they have no desire to bear or to raise; while women desiring to bear children are not simply coerced. In fact, women desiring to give birth are given complete freedom to choose their favored alternative, encouraged by economic inducement and influenced only by the multitude of individual considerations which directly and relevantly bear upon the problem, unstructured and unimpeded by state action.

The rights to use contraception[38] or to terminate a pregnancy[39] as pronounced by this Honorable Court, are neither less nor more equal than the rights to beget[40] and to raise children.[41] Parenthood or non-parenthood is a matter of individual privacy and,

"If the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[42]

The state has no legitimate interest in favoring parenthood in its citizens. Petitioners have never advanced a legitimate reason for such a position in this cause. The three reasons advanced by the State of Texas in defense of its restrictive abortion statute,

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[38] *Griswold,* et al. v. *Connecticut,* 381 U.S. 479 (1965); and *Eisenstadt,* etc. v. *Baird,* 405 U.S. 438 (1972).

[39] *Roe* and *Doe.*

[40] *Skinner* v. *Oklahoma* ex rel. *Williamson,* etc., 316 U.S. 535 (1942).

[41] *Pierce,* etc., et al. v. *Society of Sisters,* 268 U.S. 510 (1925); and *Meyer* v. *State of Nebraska,* 262 U.S. 390 (1923).

[42] *Eisenstadt, supra* at note 38, at 453.

"illicit sexual conduct",[43] safe "medical procedure"[44] and "protecting prenatal life"[45] were all discounted and refuted in *Roe*.[46]

Even assuming *arguendo*, that a rational basis is the standard to be applied; as this Honorable Court noted in *United States Department of Agriculture*, et al. v. *Moreno*, et al., 413 U.S. 528 (1973),

> "Under traditional equal protection anaylsis, a legislative classification must be sustained if the classification itself is rationally related to a legitimate governmental interest." 413 U.S. at 533.
>
> . . .
>
> "Traditional equal protection analysis does not require that every classification be drawn with precise 'mathematical nicety'. *Dandridge v. Williams*, 397 U.S., at 485. But the classification here in issue is not only 'imprecise,' it is wholly without any rational basis." 413 U.S. at 538.

Could the converse situation ever seriously be suggested as constitutional? *I.e.*, the state could provide abortion services within the public hospitals and use medical funds to reimburse abortion expenses, while prohibiting the use of public hospital facilities and medicaid funds for maternity and child birth services. Clearly, the answer is no!

As noted by the Fourth Circuit in the most recent hospital facility case, the hospital must,

> ". . . admit patients seeking abortions on the same basis as patients seeking other surgical procedures of similar difficulty and involving to a similar extent the use of hospital facilities, all in accord with the command of *Roe*, *supra*, 410 U.S. at 164, 93 S.Ct. 705." *Doe* v. *Charleston Area Medical Center, Inc.*, et al., 529 F.2d 638, 645 (4th Cir. 1975).

[43] *Roe* at 148.

[44] *Ibid.*

[45] *Id.* at 150.

[46] *Id.* at 148-152.

Petitioner Wochner testified that the financial costs of early abortions is less than the cost of providing childbirth services and that he would have provided abortion services within the public hospitals had he not been directed to the contrary by Petitioner Poelker. (R. 22-23; 30-31).

Petitioners have chosen to offer medical treatment for the condition of pregnancy within the public hospitals; but they have simultaneously and arbitrarily excluded abortion, one recognized course of treatment for that condition. The federal courts have consistently made clear that the treatment of pregnancy includes abortion and abortion may not be arbitrarily

As clearly enunciated in the original *Klein*, *supra*, decision, stigmatized as a method of treatment.

> "Pregnancy is a condition which in today's society is universally treated as requiring medical care, prenatal, obstetrical and post-partum care, and undeniably it is provided under the Medicaid program as 'necessary' medical assistance although pregnancy is not an abnormal condition, nor does the medical assistance in child birth 'cure' it. Medical assistance for abortion is not less 'necessary' because an election to bear the child would obviate that medical assistance and require instead other, more extensive and more expensive medical assistance. The pregnant woman may not be denied necessary medical assistance because she has made an unwarrantedly disfavored choice, and no other basis appears here for denying medical assistance." 347 F.Supp. at 500.

And as most recently stated,

"The fact that women in the early stages of pregnancy can choose between alternative methods of treatment, neither of which will greatly endanger their lives or physical health, does not make either alternative less necessary than the other. Defendants infer from the fact of the choice that one of the options is not 'necessary.' It is the voluntary character of the choice at the time that it is made that defendants use to differentiate elective abortions from other medical procedures. However, the election is not as free as defendants assert. Once pregnant, a woman is in need of medical treatment, and she must choose one service or another. She is not acting out of whim; she is choosing, in her own best interests, between alternative methods of treatment for a condition which defendants recognize places her in need of medical attention. Nontherapeutic abortions are no less necessary than other methods of treatment of pregnancy merely because a woman has the option of carrying her pregnancy to full-term, an alternative which defendants find preferable." *Coe*, et al. v. *Hooker*, et al., 406 F.Supp. 1072, 1082-1083 (D. N.H. 1976).

Lastly,

> "The view that abortion and childbirth, when stripped of the sensitive moral arguments surrounding the abortion controversy, are simply two alternative medical methods of dealing with pregnancy may be gleaned from the various opinions in *Roe* and *Doe*. *See Roe* v. *Wade*, *supra*, 410 U.S. at 129-147, 148-50, and 170, 93 S.Ct. 705 (Stewart, J., concurring); *Doe* v. *Bolton*, *supra*, 410 U.S. at 218-20, 93 S.Ct. 739 (Douglas, J., concurring); *Doe* v. *Beal*, 523 F.2d 611, 622 (3d Cir. 1975); *Wolfe* v. *Schroering*, 388 F.Supp 631, 637 (W.D. Ky. 1974); . . ." *Roe*, et al. v. *Norton*, etc., et al., 408 F.Supp. 660, 663 at n. 3 (D. Conn. 1975).

G. **The imposition of an unconstitutional condition.**

This Honorable Court has consistently prohibited the granting or denial by the state of a privilege or benefit, premised upon the surrendering of a constitutional right. In *Memorial Hospital*, *supra*, the infringement imposed by the State of Arizona upon the fundamental right to interstate travel, by the withholding of medical treatment to residents of less than one year duration, was voided. What was true in *Memorial Hospital*, *supra*, concerning the right to travel is even more emphatic in regard to the fundamental right of privacy surrounding the abortion decision. The decision to terminate a pregnancy is one directly bearing on the life of the pregnant woman. The maternal mortality rate for abortion at all stages of gestation in 1974 was 3.1 per 100,000,[47] while the maternal mortality rate for childbirth was 26.8 per 100,000.[48, 49]

> ". . . it is at least clear that medical care is as much 'a basic necessity of life' to an indigent as welfare assistance. And, governmental privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of governmental entitlements." *Memorial Hospital*, 415 U.S. at 259.
>
> "The denial of medical care is all the more cruel in this context, falling as it does on indigents who are often without the means to obtain alternative treatment." *Id.* at 261.

As recently stated in the analogous medicaid context,

> "When Connecticut refuses to fund elective abortions while funding therapeutic abortions and prenatal and post-

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[47] *Center for Disease Control*: *Abortion Surveillance*: *1974*, U.S. DEPT. H.E.W. (1976), at 5.

[48] *Vital Statistics of the United States (1973)*, U.S. DEPT H.E.W.

[49] For findings identical to those in notes 47 and 48; see, *Induced Abortion*: *1975 Factbook*, REPORTS ON POPULATION/FAMILY PLANNING, Population Council, New York: December 1975.

natal care, it weights the choice of the pregnant mother against choosing to exercise her constitutionally protected right to an elective abortion. See *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250, 94 S.Ct. 1076, 39 L.Ed. 2d 306 (1974); *Shapiro* v. *Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969); cf. *Sosna* v. *Iowa*, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975). Her choice is affected not simply by the absence of payment for the abortion, but by the availability of public funds for childbirth if she chooses not to have the abortion. When the state thus infringes upon a fundamental interest, it must assert a compelling state interest that justifies the incursion. *Dunn v. Blumstein*, 405 U.S. 330, 338-42, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972)." *Roe*, et al. v. *Norton*, etc., et al., 408 F.Supp. 660, 663-664 (D. Conn. 1975).

This Honorable Court in *Sherbert* v. *Verner*, et al., etc., et al., 374 U.S. 398, 405 (1963), noted in regard to the parallel extension of a state benefit in *Speiser* v. *Randall*, etc., 357 U.S. 513 (1958) that,

> "While the State was surely under no obligation to afford such an exemption, we held that the imposition of such a condition upon even a gratuitous benefit inevitably deterred or discouraged the exercise of . . . rights . . . and thereby threatened to 'produce a result which the State could not command directly.' "

The "carrot and stick" erosion of constitutional rights by state action has been refuted consistently by this Honorable Court since *Missouri* ex rel. *Gaines* v. *Canada*, etc., 305 U.S. 337 (1938).

H. **The socio-economic discrimination.**

Any state action encumbrances which restrict access to abortions at public hospitals, disproportionately compound the availability of abortions for indigent women. Economically advantaged women, more readily able to afford the luxuries of private physicians, have the means and access to obtain the desired medical services, outside the sphere of Petitioners' policies.

On their face, the challenged policies make no distinction on the basis of a patient's race, economic status or social position. Yet, as applied, these and similar policies have systematically come to deny safe medical abortions to the poor and to other minority groups. Moreover, illegal abortions and their concomitant incidents of morbidity and mortality appear to occur largely among the economically deprived sectors of our society. Several scholarly studies from the medical literature thoroughly document this discrimination.

The "Gold study"[50] covers the 1943 to 1962 period in New York City. Gold showed that from 1960-1962, for example, 55.6% of the puerperal deaths among the Puerto Rican population were due to abortion. In the same period 49.4% nonwhite puerperal deaths had the same cause, but among whites the figure was only 25.2%. In other words, well over half of the deaths associated with child-bearing of Puerto Rican women, and one-half of the same kinds of deaths of nonwhite women came from bungled abortion.[51]

Not only did Puerto Rican and nonwhite women get the worst nonmedical abortions, but they received very few of the abor-

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[50] Gold, *et al.*, *Therapeutic Abortions in New York City: A 20-Year Review*, 55 AM.J.PUB.HEALTH 964 (1965).

[51] *Id.* at 965, at Table 1.

tions granted by hospital committees. The Gold study further revealed that white women obtained 92.7% of the hospital abortions granted in 1960 to 1962, as contrasted with 0.9% Puerto Rican and 6.4% nonwhite. Whites received 103 (92.7) / (0.9) times as many abortions as Puerto Ricans and 14.5 (92.7) / (6.4) times as many as nonwhites.[52]

Two studies of hospitals across the United States reveal the same pattern of discrimination against indigent ward patients. A 1965 study by Dr. Robert E. Hall, of 60 major American hospitals revealed that the abortion/delivery ratio for private patients was three and six-tenths times higher than that for ward patients.[53] Similarly, a 1968 study be Dr. Christopher Tietze[54] dealt with the ethnic characteristics of aborted patients and the indications for hospital therapeutic abortions at several hundred American hospitals which participate in the yearly Professional Activities Survey.[55] Thirty-four percent of the abortions counted in the survey were done for "psychiatric" indications.[56] And, "the incidence of therapeutic abortion was almost twice as high among white women as among the nonwhite group."[57]

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[52] *Id.* at 966, at Table 3.

[53] Hall, *Therapeutic Abortion, Sterilization, and Contraception*, 91 AM.J.OBSTET. AND GYNECOL. 518, 524-525 at Table VI (1965).

[54] Tietze, *Therapeutic Abortions in the United States*, 101 AM.J. OBSTET. AND GYNECOL. 784 (1968).

[55] These hospitals numbered "269 in 1963, 321 in 1964, and 384 in 1965." *Id.* at 784.

[56] *Id.* at 785, at Table I.

[57] *Id.* at 786.

In the two Missouri hospitals included in Hall's study, *supra*, St. Louis Maternity (Barnes) and the University of Missouri Medical Center at Columbia, the ratio of combined abortions to deliveries among private patients was 1:1,426 and among ward patients was 1:3,515; two and one-half times as high among the former as the latter. There is no reason to suspect that the results of studies elsewhere in the United States differ in any significant manner from conditions and circumstances in Missouri, even today, as shall appear, *infra*.

This discrimination, it should be noted, is not the inevitable result of unequal distribution of societal wealth. It is the product both of governmental action and inaction. Public hospitals simply do not provide the desired access to abortion on the same scale as do private institutions. Except in cases where abortion would be deemed necessary to save a patient's life, to a greater or lesser degree, the public hospital does not provide full informational, diagnostic and treatment facilities to the indigent patient.[58] Political pressure from special interest groups have greatly influenced hospital policy regarding abortion and the fundamental rights of women as to abortion have become a political football.

Perhaps no other factor has played so great a role in recent changes in abortion laws, as the unquestionable realization that abortion had always been freely available, virtually upon request, to those with means. Medical abortions continue, however, to be all too frequently beyond the reach of the poor, and they consequently turn to local quacks, midwives, plumbers and even worse. The result is the paradox that can be found in any large metropolitan community. Wealthy women enter the front door

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[58] See, *Provisional Estimates of Abortion Need and Services in the Year Following the 1973 Supreme Court Decisions: United States, Each State and Metropolitan Area*, THE ALAN GUTTMACHER INSTITUTE, New York: 1975, at 39, at Table Y, indicating that only 15% of the nation's public hospitals were providing abortions by the first quarter of 1974.

of a private hospital or facility. They receive a medical abortion under the finest of conditions. The poor woman enters the public hospital through the back door, often on the verge of death. She has had a septic abortion which has caused serious infection, bleeding and, on occasion, death.[59] The hospital authorities complete this abortion and administer antibiotics, transfusions and intense care. The impoverished woman remains several days and may recover, at considerable cost to the State. State acquiescence in the hundredfold recurrence of this paradox is the cause of this socio-economic discrimination. A decision by this Honorable Court would swing open wide the public hospital's front door to the impoverished woman and eliminate much of the incontrovertible discrimination complained of herein.

If the Petitioners' policies expressly limited the number of abortions for ward and indigent patients, or, if the rules of a particular hospital so provided, the statute on its face would be unconstitutional. It has repeatedly been said, " 'Indigence' in itself is neither a source of rights nor a basis for denying them. The mere state of being without funds is a neutral fact—constitutionally an irrelevance, like race, creed, or color." *Edwards* v. *California*, 314 U.S. 160, 184-185 (1941) (concurring opinion of Mr. Justice Jackson). In the abortion context, however, indigency is a relevant, indeed a crucial factor. Arguably it is the only factor. Both of the challenged policies serve to thwart the poor in their access to a medical procedure—abortion—which is commonly available to those with funds and contacts.

In recent years, this Honorable Court has focused upon laws which in effect discriminate against individuals because of poverty. In *Griffin*, et al. v. *Illinois*, 351 U.S. 12 (1956), two indigent defendants could not appeal as otherwise they could have of right under Illinois law, because they could not afford a needed trial transcript. The state statute made such tran-

[59] See, The St. Louis *Post Dispatch*, June 10, 1975, at 1 and 8.

scripts equally available to all who could pay the required fee. While recognizing that the Constitution does not necessarily require any appellate review, this Honorable Court held that once a state grants review, it cannot do so "in a way that discriminates against some convicted defendants on account of their poverty."[60]

The Court stated,

> "Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant. Consequently at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations. . . . There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[61]

Harper, et al. v. *Virginia Board of Elections*, et al., 383 U.S. 663 (1966), a decision dealing with the poll tax, also illustrates this Honorable Court's concern with the effect of poverty upon the exercise of fundamental personal rights. In declaring the Virginia poll tax of $1.50 per person unconstitutional under the equal protection clause, this Honorable Court emphasized that the right of suffrage is a fundamental one in a free society. The State had pointed out that it exacts fees for many purposes from its citizens. In reply to this argument this Honorable Court said,

> "Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race . . . are traditionally disfavored. . . . To intro-

[60] 351 U.S. at 18.

[61] *Id.* at 18-19. See, also, *Douglas*, et al. v. *California*, 372 U.S. 353 (1963).

duce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor. The degree of the circumstances is irrelevant. In this context—that is, as a condition of obtaining a ballot—the requirement of fee paying causes an 'invidious' discrimination . . . that runs afoul of the Equal Protection Clause."[62]

While *Griffin, supra,* involved the criminal process, and *Harper, supra,* the vote, Respondents are asserting rights of equal constitutional stature, and in an area of human behavior of equal importance. As this Honorable Court stated with reference to privacy in *Griswold, supra,* "(w)e deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system."[63]

Equal protection concepts have matured in recent years. States are being required to take steps to remove criminal, civil and administrative inequities which are not directly the State's creation. Thus in the circumstances present in *Griffin, supra,* and *Douglas, supra,* and their progeny, the indigent were to be provided respectively with free transcripts and free appellate counsel; in *Harper, supra,* no person could be required to pay a poll tax. Indigency and financial burdens have similarly been held void when used to prevent candidacy for public office.[64]

Commentators have pointed to this emphasis "upon measures the states adopt in carrying on their activities and steps they must take to offset disabilities not of their creation,"[65]

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[62] 383 U.S. at 668.

[63] *Griswold, supra* at note 38, at 486.

[64] *Lubin* v. *Panish,* etc., 415 U.S. 709 (1974); and *Bullock,* et al. v. *Carter,* et al., 405 U.S. 134 (1972).

[65] Cox, *THE SUPREME COURT 1965 TERM Forward: Constitutional Adjudication and the Promotion of Human Rights,* 80 HARV.L.REV. 91, 93 (1966).

and have discussed this trend in relation to traditional equal protection theory.[66] What emerges is a requirement that the state give "attention to those inequalities for which it is not directly responsible, but which nevertheless are concomitant features of the existence of the organized state," and "adopt a standard of proportional equality which takes account of the differing needs of its citizens, whenever those needs stand in the way of equal access to the basic resources of national life."[67]

Analogously, indigents have been granted access to the courts for dissolution of their marriages,[68] marriage being a fundamental right involving privacy.[69]

While it is true that not every inequality constitutes a denial of equal protection, basic rights are involved here and under the present system the lives and the health of poor patients are drastically affected through the denial of proper medical care, free from the rigors of the Petitioners' moral strictures.

What was said by Mr. Justice White in his concurring opinion in *Griswold, supra,* is equally applicable here,

> "(T)he clear effect of these statutes, as enforced, is to deny disadvantaged citizens of Connecticut, those without either adequate knowledge or resources to obtain private counseling, access to medical assistance and up-to-date information in respect to proper methods of birth

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[66] See, generally: Michelman, THE SUPREME COURT 1968 TERM Forward: *On Protecting the Poor Through the Fourteenth Amendment,* 83 HARV.L.REV. 7 (1969); Goldberg, *Equality and Governmental Action,* 39 N.Y.U.L. REV. 205 (1964); and Note, *Discriminations Against the Poor and the Fourteenth Amendment,* 81 HARV.L.REV. 435 (1967).

[67] *Developments in the Law Equal Protection,* 82 HARV.L. REV. 1065, 1189-1190 (1969).

[68] *Boddie,* et al. v. *Connecticut,* et al., 401 U.S. 371 (1971).

[69] *Loving,* et ux. v. *Virginia,* 388 U.S. 1 (1967).

> control. . . . In my view, a statute with these effects bears a substantial burden of justification when attacked under the Fourteenth Amendment. *Yick Wo* v. *Hopkins*, 118 U.S. 356; *Skinner* v. *Oklahoma*, 316 U.S. 535 . . ."[70]

In *United States* v. *Vuitch*,[71] the District Court discussed this claim briefly,

> "National and local policy provides free medical care for the poor. It is legally proper and indeed imperative that uniform medical abortion services be provided all segments of the population, the poor as well as the rich. Principles of equal protection under our Constitution require that policies in our public hospitals be liberalized immediately."[72]

What this Honorable Court stated in *Lindsey*, et al. v. *Normet*, et al., 405 U.S. 56, 79 (1972), regarding the posting and forfeiture of double bond for tenant appeals is equally applicable here.

> "The discrimination against the poor, who could pay their rent pending an appeal but cannot post the double bond, is particularly obvious. For them, as a practical matter, appeal is foreclosed, no matter how meritorious their cause."

In the City of St. Louis, the indigent pregnant patient desiring to terminate pregnancy is utterly foreclosed from the public facilities, which otherwise proved her a full range of medical services. She is forced to seek the charity of the private medical sector for assistance or go unattended, no matter how meritorious her cause.

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[70] 381 U.S. at 503.

[71] 305 F.Supp. 1302 (D.D.C. 1969), *reversed on other grounds*, 402 U.S. 62 (1971).

[72] *Id.* at 1035.

The singling out of one class of indigents for punitive and discriminatory treatment has been denounced by this Honorable Court.[73]

The exaggerated effect of restrictive abortion legislation upon the poor has been repeatedly recognized in Medicaid cases, specifically applicable to indigents, and in other public hospital cases, not specifically applicable to indigents. (See notes 33 and 34, *supra*.)

In the instant case, as in *Griswold*, *supra*, and *Vuitch*, *supra*, the statutes in question have resulted in a discrimination against the poor. It should not matter whether or not the discrimination was the result of a conscious policy, for the Petitioners have consciously adopted and retained abortion policies which inexorably leads to the systematic socio-economic discrimination described. The previous distinction between government benefits being construed as "rights" or as "privileges" no longer is of constitutional import. *Graham*, etc. v. *Richardson*, et al., 403 U.S. 365, 374 (1971).

As the Eighth Circuit succinctly noted in this case,

> "Stripped of all rhetoric, the city here, through its policy and staffing procedure, is simply telling indigent women, like Doe, that if they choose to carry their pregnancies to term, the city will provide physicians and medical facilities for full maternity care; but if they choose to exercise their constitutionally protected right to determine that they wish to terminate the pregnancy, the city will not provide physicians and facilities for the abortion procedure, even though it is probably safer than going through a full pregnancy and childbirth. Roe v. Wade, 410 U.S. 113, 163, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). No rational or legally cognizable basis for this distinction is offered." 515 F.2d at 544.

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[73] *James*, etc., et al. v. *Strange*, 407 U.S. 128, 142 (1972).

The effect of these policies upon the delivery of services in St. Louis is catastrophic. By April of 1974, only four per cent of the public hospitals in Missouri offered abortion services.[74] In 1974 in the St. Louis area, the estimated need for abortion services was 17,105 cases, of which 7,710 or 45% were women of low or marginal income status.[75] The total percentage of the need for services which was met by existing facilities was a meager 20.5%.[76]

I. **Petitioners' lament.**

Petitioners expend many words and pages in their Brief whining about their own failure to utilize effectively pre-trial discovery. The failure is entirely of Petitioners' making. Petitioners never submitted interrogatories to Respondents, were able to take Respondent Doe's deposition prior to trial and never sought delay of the trial. They utterly fail to suggest how they have been prejudiced in any manner, since each and every District Court decision was at their prompting and in their favor.

The failure of Petitioners to discover the identity of Respondent Doe at an earlier point of time lies entirely upon them. They never previously sought to take her deposition nor in any manner pressed for discovery. Petitioners fault Respondents for utilizing discovery and complain that Respondents "pressed . . . (them) to make admissions through answering interrogatories . . ." (Pet. Br. at 53). It is incomprehensible how Respondents can logically be chided for exercising discovery procedures.

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[74] *Provisional Estimates of Abortion Need and Services in the Year Following the 1973 Supreme Court Decisions: United States Each State and Metropolitan Area*, THE ALAN GUTTMACHER INSTITUTE, New York: 1975, at 39, at Table Y.

[75] *Id.* at 56, at Table 2.

[76] *Id.* at 61, at Table 4.

Next, Petitioners chide Respondents for pressing for summary judgment, a motion not granted by the District Court. (Pet. Br. at 54). Once again, Petitioners choose to accuse Respondents' counsel of filing a false affidavit (Pet. Br. at 54), a claim made by Petitioners at every level of proceedings. Neither the District Court nor the Court of Appeals on any of three occasions saw fit to ever acknowledge Petitioners' claim in this regard. How logically can Petitioners be heard to complain, when the District Court did dismiss the action for lack of standing.

Respondents have no desire to dispute at length Petitioners' statements as to the events occurring during pre-trial conferences. Respondents do state emphatically that they deny and reject categorically as untrue Petitioners' statements contained within their Brief (Pet. Br. at 52-62), which are not specific matters of record. They are merely Petitioners' subjective conclusions, far removed from fact, reality or law.

III

The Appellate Court Correctly and Properly Awarded to Respondents Their Attorneys' Fees on the Basis of Petitioner Poelker's "Bad Faith".

The Appellate Court's award of attorney fees on the basis of bad faith was amply supported by the record, the content of Petitioners' pleadings filed throughout the course of the District Court litigation (*e.g.*, see 515 F.2d at 547-48, at n. 8), the position and language of Petitioners' appellate briefs and the oral argument and conduct of Petitioners' counsel at appellate hearings. There was no need for additional hearings on the issue and such hearings could not have negated Petitioners' conduct, as exemplified in the manners above set forth.

In addition, the record clearly evidenced the following uncontroverted facts.

Petitioner Poelker, Mayor of the City of St. Louis, testified that Petitioner Wochner served as his appointee. (R. 3). Prior to and since April 5, 1973, Petitioner Poelker, through Petitioner Wochner, had enforced the policy that no abortions be performed within the city public hospitals unless "the life of the mother is in danger". (R. 6). The only stated reason for adoption of the policy by Petitioner Poelker was "my own personal conviction that abortion is murder". (R. 10). Both Petitioners Poelker and Wochner testified that the policy was enforced despite the fact that no investigations, studies or surveys were ever made in regard to: the possibility of providing abortions and the cost factors involved (R. 11, 28); the availability of appropriate facilities (R. 12, 28); the availability of trained, experienced or willing personnel (R. 12, 28, 29); the availability of arranging with a private medical facility to handle City Hospital patients (R. 13); or the effect of providing abortions on existing services presently offered (R. 39, 40). But for the directions of Petitioner Poelker, Petitioner Wochner, Director of Health and Hospitals for the City of St. Louis and Acting Hospital Commissioner for the City of St. Louis (R. 19, 22-23), would have provided abortions within the public hospital facilities. (R. 31).

The public hospital facilities did and do provide prenatal care, postnatal care, childbirth and delivery services, miscarriage treatment, dilitations and curettages (D's and C's), hysterectomies and hysterotomies. (R. 29). Petitioner Wochner further stated that the cost of providing early abortions was less than the cost of providing childbirth services (R. 30, 31).

Finally, Petitioner Wochner testified that not a single abortion had "been performed at the St. Louis public hospitals since January 1 of 1973 to date" (November 25, 1974). (R. 31).

Petitioner Poelker has never sought to justify his actions, other than by his personally held beliefs. In no manner can the award

by the Court of Appeals be considered an abuse of discretion, which Petitioners agree is the proper standard of review. (Pet. Br. at 61). Judges Ross and Smith participated in the prior appellate decision reported at 497 F.2d 1063 (8th Cir. 1974), as well.

Judge Van Oosterhout, who dissented from the award of fees on the basis of bad faith, did concur in the award of fees on the basis of "private attorney general". (Pet. W.C. at A-38). The Appellate Court's award on the basis of "bad faith" was not a new theory for as the Court of Appeals, Judge Van Oosterhout concurring, had earlier noted,

> "Doe suggests that awarding attorneys' fees would be proper here under another exception to the rule—where a party has acted in bad faith, vexatiously, wantonly or for oppressive reasons. . . . However, in light of our determination that attorneys' fees are to be awarded under the 'private attorney general' theory, we need not and do not decide whether or not the actions of the city underlying this litigation and during the course of it call for application of this second exception." Pet. W.C. at A-37 through A-38.

There is no issue here of the Court of Appeals offering to Respondents a trial *de novo*. The judgments of the Court of Appeals are all founded upon the correct application of legal principles to uncontroverted and unambiguous factual circumstances. The characterization of Petitioner Poelker as "arbitrary," "obstinate", "intransigent", "wanton", "callous", "oppressive" and "obdurate" was not lightly made. (515 F.2d at 541-548).

The proper award of attorneys' fees in this case has served notice upon the public officials of the City of St. Louis that they may not continue in cavalier fashion to infringe abortion rights, without shouldering the financial burden of those who continue to challenge the same successfully in the courts.

The facts as to Respondent Doe's obligation to pay fees, as to her having incurred the same or as to their ultimate disposition are not relevant.[77]

IV

The Appellate Court Correctly and Properly Decided That Respondent Doe Had Standing on Her Own Behalf and on Behalf of Her Class.

Respondent Doe was pregnant on August 17, 1973 as alleged in her "Complaint for Declaratory Judgment and Injunctive Relief," paragraph 7, filed on August 17, 1973 (A. 7) and as verified in her "Affidavit of Plaintiff, Jane Doe," paragraph 4, filed on October 5, 1973. (A. 38). In fact, Respondent Doe on August 17, 1973 was in the last few days of the first trimester of pregnancy. Her inability to obtain an immediate abortion would have foreclosed the possibility of obtaining an out-patient clinical procedure and have necessitated an in-patient surgical method involving substantially, increased, risk to her.

Respondent Doe readily admitted that she obtained an abortion on August 22, 1973. The mortality and morbidity of abortion increases with every passing day of gestation. The natural reticence of potential plaintiffs in actions of this type, who are willing to brave the risk of public disclosure, harassment and distain must not be ignored;[78] particularly since many of those who utilize the public hospital facilities are least able to afford the financial, energy and time expenses of litigation.

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[77] See: *Fairley*, et al., etc. v. *Patterson*, etc., et al., 493 F.2d 598, 606-607 (5th Cir. 1974); *Brandenburger*, et al. v. *Thompson*, etc., 494 F.2d 885, 889 (9th Cir. 1974); and *Hairston* v. *R & R Apartments*, et al., 510 F.2d 1090, 1092-1093 (7th Cir. 1975).

[78] *Singleton*, etc. v. *Wulff*, et al., — U.S. — (1976); and 515 F.2d at 542, at n. 1.

Respondents would direct the attention of this Honorable Court to its language in *Roe*, *supra*, wherein it unequivocably answered the specific question of the effect of a pregnancy's termination on mootness.

> "A. *Jane Roe*. Despite the use of the pseudonym, no suggestion is made that Roe is a fictitious person. For purposes of her case, we accept as true, and as established, her existence; her pregnant state, as of the inception of her suit in March 1970 and as late as May 21 of that year when she filed an alias affidavit with the District Court; and her inability to obtain a legal abortion in Texas.
>
> . . .
>
> "The appellee notes, however, that the record does not disclose that Roe was pregnant at the time of the District Court hearing on May 22, 1970, or on the following June 17 when the court's opinion and judgment were filed. And he suggests that Roe's case must now be moot because she and all other members of her class are no longer subject to any 1970 pregnancy.
>
> "The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated. . . .
>
> "But when, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be 'capable of repetition, yet evading review.' . . .

"We therefore agree with the District Court that Jane Roe had standing to undertake this litigation, that she presented a justiciable controversy, and that the termination of her 1970 pregnancy has not rendered her case moot." 410 U.S. at 124-125.

Similarly, is *Doe, supra,* decided the same day in which this Honorable Court, noting that the action was filed on April 16, 1970 (410 U.S. at 184), held pregnancy on day of filing to be sufficient, without evidence or notation of pregnancy beyond that date.

"Our decision in Roe v. Wade, 410 U.S. 113, 35 L.Ed.2d 147, 93 S.Ct. 705, establishes (1) that, despite her pseudonym, we may accept as true, for this case, Mary Doe's existence and her pregnant state on April 16, 1970; (2) that the constitutional issue is substantial; (3) that the interim termination of Doe's and all other Georgia pregnancies in existence in 1970 has not rendered the case moot; and (4) that Doe presents a justiciable controversy and has standing to maintain the action.

". . . Doe and her class are recognized . . ." 410 U.S. at 187-188.

Additional cases involving pregnant plaintiffs representing such a class and in which the named plaintiffs were no longer pregnant at later stages of trial or appeal, although pregnant at institution of suit are: *Doe*, et al. v. *Bolton*, et al., 319 F.Supp. 1048 (N. D.Ga. 1970); *Doe*, et al. v. *Scott*, etc., et al., 321 F.Supp. 1385 (N.D.Ill. 1971); *Poe*, et al. v *Menghini*, et al., 339 F.Supp. 986 (D.Kan. 1972); and *Roe*, et al. v. *Wade*, 314 F.Supp. 1217 (N.D.Tex. 1970), among a multitude of others.

As so aptly noted in the original *Klein*, et al. v. *Nassau County Medical Center*, et al., 347 F.Supp. 496, 499 (E.D.N.Y. 1972),

"The issues of right presented are such that 'class' action is peculiarly appropriate, indeed necessary. De-

fendants' refusal to act as plaintiffs requested was based upon grounds generally and uniformly applicable to the class of which plaintiffs were members at the time they joined or initiated the action as parties plaintiff, and it is appropriate that the relief granted in the action be granted with respect to the entire class (a class of changing membership but of constant defining characteristics) of pregnant women who within twenty-four weeks after the commencement of their pregnancy apply for abortional procedure at the Nassau County Medical Center without showing that abortion is medically indicated, whose income and resources are insufficient to meet the costs of necessary medical service, and who are eligible for medical assistance with respect to their pregnancies at the Nassau County Medical Center pursuant to Title 11 of New York Social Welfare Law."

Petitioners cite *Abele*, et al. v. *Markle*, et al., 452 F.2d 1121 (2nd Cir. 1971) as authority (Pet. Br. at 81), but the same is totally inapplicable, inasmuch as no women plaintiffs were pregnant at the time of filing that suit.

"Accordingly we hold that non-pregnant female plaintiffs in this category do not show a sufficient nexus or present a sufficiently concrete issue in an adversary setting to give them standing, and we affirm the district court's dismissal of the complaint as to plaintiffs claiming standing solely on the basis of their childbearing age." 452 F.2d at 1125.

Similarly, *Crossen*, et al. v. *Breckenridge*, et al., 446 F.2d 833 (6th Cir. 1971) is cited by Petitioners as authority for their claim. (Pet. Br. at 82). In fact, a close reading of the related *Crossen* cases demonstrates the absolute correctness of Respondents' position.

"The case was filed by the plaintiffs on May 13, 1970. . . . The plaintiffs, an obstetrician, a minister, a pregnant

woman (Craddock), a woman having the capacity to become pregnant and a women's liberation group, each claimed standing to attack the statute." (Parenthetical material supplied). *Crossen*, et al. v. *Attorney General of the Commonwealth of Kentucky*, 344 F.Supp. 587, 588-589 (E.D.Ky. 1972), *vacated and remanded*, 410 U.S. 950 1973).

Crossen, supra, had originally been dismissed for lack of standing on October 7, 1970 (344 F.Supp. at 589), some 147 days after filing. On June 23, 1971, some 406 days after filing, the Sixth Circuit Court of Appeals reversed and held,

> "At the commencement of the action appellant Craddock was pregnant and had allegedly been denied an abortion . . . On these facts we find that appellant Craddock has standing . . .
>
> . . .
>
> "Appellant Pozzuto, on behalf of herself and all other similarly situated married women, alleges that she is not pregnant but may desire to terminate future pregnancies and would be unable to obtain a medical abortion . . . we hold that appellant Pozzuto does not have standing . . ." *Crossen*, et al. v. *Breckenridge*, et al., 446 F.2d 833, 839 (6th Cir. 1971).

On May 19, 1972, some two years and six days after filing of suit, the District Court ruled on the merits of the plaintiffs' claims, including plaintiff Craddock who had been pregnant at the initial filing of said cause. *Crossen*, et al. v. *Attorney General of the Commonwealth of Kentucky*, 344 F.Supp. 587 (E.D. Ky. 1972), *vacated and remanded on other grounds*, 410 U.S. 950 (1973).

The First Circuit Court of Appeals has also held that termination of pregnancy during pendency of district court proceedings

does not render the cause moot, even though plaintiffs aborted immediately after filing suit and before trial.

> "First, defendant says that he has a probability of succeeding on the merits because plaintiffs' case is moot due to the fact that after its commencement plaintiffs voluntarily obtained abortions in New York. The fact that a plaintiff had other available relief does not moot the case. Hathaway v. Worcester City Hospital, 1 Cir., 1973, 475 F.2d 701, and defendant does not so claim. Nor, of course, does defendant dispute the basic *Roe* rule that the necessarily short duration of a pregnancy does not, in normal circumstances, create mootness when pregnancy ceases.
>
> . . .
>
> "We consider that defendant's claim of mootness is a will-o'-the wisp and assumes the very question at issue. If a plaintiff has a right to terminate her pregnancy—which is the legal question before us—the sooner she succeeds in doing so, the better. We have in mind the trimester trilogy, on which defendant relies in another connection, and its effect on viability and the pregnant plaintiff's health. *See* Roe v. Wade, 410 U.S. at 149-150, 93 S.Ct. at 725. It seems not only illogical but, to use a polite word, harsh, to argue that in order to establish her right to an abortion a woman must decline to have it." *Doe*, et al. v. *Israel*, etc., 482 F.2d 156, 158 (1st Cir. 1973), *cert. denied*, 416 U.S. 993 (1974).

The position of Petitioners may be likened to the historical practice of proving one's innocence of witchcraft by drowning.

In *Doe*, et al. v. *Bolton*, etc., et al., 319 F.Supp. 1048 (N.D. Ga. 1970), decided July 31, 1970, plaintiff Doe would have been 24 weeks pregnant when the District Court finally ruled. *Doe, supra*, 410 U.S. at 185.

The District Court below noted that Respondent Doe terminated her pregnancy prior to service on Petitioner Wochner. Diligent service was attempted but the named defendant was out of town. The date of service, if diligent, has never been held a critical time under federal law in various considerations; but, instead, the filing of the action is the relevant consideration of timeliness.[79] Federal Rule of Civil Procedure No. 3 specifically provides, "A civil action is commenced by filing a complaint with the court".

The language of *Roe, supra,* and *Doe, supra,* as to standing in pregnancy cases is not strictly applicable to only the appellate process. No logical reason exists to so narrowly interpret it nor does reason support such an interpretation. A close reading belies such a meaning or intent. The language is equally applicable to all stages of litigation. To hold otherwise would institute an arbitrary distinction and subject pregnant plaintiffs to the capricious whims, delays and dilatoriness of courts and opposing counsel. It should be noted that Respondent Doe was 12 weeks pregnant at time of filing, would have been 19 weeks pregnant at time of filing for summary judgment on October 5, 1973 and *would have been 39 weeks pregnant and past her expected date of delivery when the District Court below first learned of her non-pregnant status; having failed in the interim to decide or rule on her motion for summary judgment.*

As so aptly noted in *Roe, supra,* a normal pregnancy is "266-days" 38 weeks (410 U.S. at 125) and even more critically, "the risk to the woman increases as her pregnancy continues". (410 U.S. at 150).

How much risk should pregnant plaintiffs be judicially required to endure? How much risk is too much risk? Should

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[79] See: *The Moore Company of Sikeston, Missouri,* et al. v. *Sid Richardson Carbon & Gasoline Company,* 347 F.2d 921 (8th Cir. 1965); and *United States* v. *Wahl,* et al., 406 F.Supp. 1396 (E.D. Mich. 1976).

pregnant plaintiffs be required, in order to assure their standing, to assume the ever increasing rates of morbidity and mortality until the date of service on defendants, until defendants file motions, until defendants file an answer, until date of trial, until date of court judgment or until some other as equally arbitrary, indefinite and undeterminable period of time? As this Honorable Court noted, it is only during the first trimester that "(m)ortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth." (*Roe, supra,* 410 U.S. at 149). The action of the District Court placed Respondent Doe, and all potential similar plaintiffs between the Scylla of being foreclosed an abortion through the dismissal of her suit and the Charybdis of retaining her standing, at the peril of increased jeopardy to her life.

Most recently, this Honorable Court in *Planned Parenthood of Central Missouri,* et al. v. *Danforth,* etc., et al., — U.S. — (1976) reviewed the law in the area of standing and held as to abortion cases,

> "A woman who is no longer pregnant may nonetheless retain the right to litigate the point because it is 'capable of repetition yet evading review.' *Roe* v. *Wade,* 410 U.S. at 124-125."[80]

This can be no serious question of Respondent Doe's standing on her behalf and on behalf of her recognized class.[81]

Petitioners have not cited a single case in which plaintiffs were held not to have standing when pregnant at time of filing.

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[80] See: *Franks,* et al. v. *Bowman Transportation Company, Inc.,* et al., — U.S. — (1976); *Doe* v. *Mundy,* etc., et al., 514 F.2d 1179, 1181 (1975).

[81] In the present case, see: 497 F.2d at 1063; 515 F.2d at 545; and 527 F.2d at 605.

Cases denying standing to women on the basis of only a possible future pregnancy are not analogous nor of the slightest precedential value.

CONCLUSION

The number of pregnant, indigent women in the City of St. Louis, Missouri, who have been irreparably damaged through the denial to them of their fundamental constitutional rights by the arbitrary actions of Petitioners, is staggering. The principles upheld by the Appellate Court in its two prior decisions of this cause have been firmly and unanimously established by all federal courts ruling upon the identical issues. Petitioners have cited not a single case to the contrary.

Petitioners should not be allowed through emotionally laden hysterics nor ill-founded and unmeritorious legal claims to escape the full and fair impact of the Appellate Court's judgments.

At a press conference on October 10, 1975, seven months following the appellate decision on the merits, Petitioner Wochner admitted that to that date not a single abortion had yet been performed, despite the fact that the number of patient inquiries had been 450% above his recent estimate as to the expected demand.

While it is true that the policies of Petitioners have not totally foreclosed abortions for women of low and marginal incomes, the effect upon their access to services has been devastating. For no reasons other than Petitioners' hospital policies they have been denied equal protection in the making of a constitutionally protected choice. They have suffered the cruel coercion of financial support to choose carrying to term, although against their desires and against in many cases their best interests of life and health. To ignore the economic bait forces

them to rely upon the charity and beneficence of the private medical sector for assistance, a degrading alternative.

To deny indigent women the same rights of access to control over their own reproduction, fosters a perpetuation of the poverty cycle, generation after generation, and restricts their escape and rise from the conditions of their environs.

The Court of Appeals, in describing this situation, created and perpetrated by Petitioner, as "arbitrary", "callous" and "oppressive", was none too strong in its use of language.

Accordingly, Respondents respectfully pray that the judgments of the United States Court of Appeals in this cause be affirmed and all costs herein taxed against Petitioners.

Respectfully submitted,

FRANK SUSMAN
SUSMAN, SCHERMER, WILLER & RIMMEL
7733 Forsyth Boulevard—Suite 1100
St. Louis, Missouri 63105
(314) 725-7300
Attorneys for Respondents

Certificate of Service

I, the undersigned attorney for Respondents and a member of the bar of the United States Supreme Court, do hereby certify that pursuant to Supreme Court Rule No. 33 I have caused to be served true, correct and sufficient copies of the foregoing "Brief for Respondents", upon each party required to be so served, by depositing said copies in a United States Postal Serv-

ice mail box, with first class postage prepaid and affixed, addressed to Mr. Jack L. Koehr and to Mr. Eugene P. Freeman, Office of the City Counselor of the City of St. Louis, Missouri, 1200 Market Street, St. Louis, Missouri 63103, attorneys for Petitioners.

Frank Susman
Susman, Schermer, Willer & Rimmel
7733 Forsyth Boulevard—Suite 1100
St. Louis, Missouri 63105
(314) 725-7300

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1976

No. 75-442

JOHN H. POELKER, Mayor of the City of St. Louis, Missouri, and R. DEAN WOCHNER, M.D., Director of Health and Hospitals and Acting Commissioner of Hospitals of the City of St. Louis, Missouri,

Petitioners,

v.

JANE DOE, and A CLASS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF AMERICAN JEWISH CONGRESS, BOARD OF CHURCH AND SOCIETY OF THE UNITED METHODIST CHURCH, NATIONAL WOMEN'S CONFERENCE OF THE AMERICAN ETHICAL UNION, NEW YORK STATE COUNCIL OF CHURCHES, UNION OF AMERICAN HEBREW CONGREGATIONS and UNITARIAN UNIVERSALIST WOMEN'S FEDERATION, *Amici Curiae*

LEO PFEFFER
15 East 84th Street
New York, New York 10028
(212) 879-4500

Attorney for Amici Curiae

307 BAR PRESS, Inc., 132 Lafayette St., New York 10013 – 966-3906
(5473)

TABLE OF CONTENTS

	PAGE
Statement of the Case	2
Interest of the *Amici*	3
The Question to Which This Brief Is Addressed	4
Summary of Argument	4
Argument	5
I. The action by the mayor of St. Louis in forbidding abortions in municipal hospitals violates the Supremacy Clause (Article VI) of the Constitution	5
II. The mayor's action challenged herein violates the First Amendment's dual guaranty of church-state separation and the free exercise of religion	11
III. The mayor's action constitutes discrimination against the poor in violation of the Equal Protection Clause of the Fourteenth Amendment by denying to them a procedure readily and lawfully available to the economically advantaged	18
Conclusion	23

TABLE OF AUTHORITIES

PAGE

Cases:

Abington School District v. Schempp, 374 U.S. 203 (1963) 8, 17
Anderson v. Laird, 466 F. 2d 283 (D.C. Cir. 1972), cert. den. 409 U.S. 1076 (1972) 13

Bailey v. Alabama, 219 U.S. 219 (1911) 7
Bellotti v. Baird, —— U.S. ——, 96 S. Ct. 2857 (1976) 9
Bigelow v. Virginia, —— U.S. ——, 95 S. Ct. 2222 (1975) 10
Board of Education of Netcong, N.J. v. State Board of Education, 108 N.J. Super. 564, 262 A. 2d 21, aff'd 57 N.J. 172, 270 A. 2d 312, cert. den. 401 U.S. 1013 (1971) 8
Boddie v. Connecticut, 403 U.S. 371 (1971) 20
Brown v. Board of Education, 347 U.S. 483 (1954) 7

Chisholm v. Georgia, 2 Dall. (2 U.S.) 419 (1793) 6
Commonwealth v. Edelin, Mass. Supreme Judicial Court, Suffolk County; Sitting, 1975, No. 393 9
Cooper v. Aaron, 358 U.S. 1 (1958) 6
Cruz v. Beto, 405 U.S. 319 (1972) 13

DeKalb School District v. DeSpain, 255 F. Supp. 655, aff'd 384 F. 2d 836, cert. den. 390 U.S. 906 (1968) 8
Doe v. Bolton, 410 U.S. 179 (1973) 3, 5, 6, 9, 10, 16, 21, 22
Douglas v. California, 372 U.S. 353 (1963) 20
Draper v. Washington, 372 U.S. 487 (1963) 20
Dred Scott v. Sanford, 19 How. (60 U.S.) 393 (1857) 6

Eisenstadt v. Baird, 405 U.S. 438 (1972) 16
Engel v. Vitale, 370 U.S. 421 (1962) 7, 8
Epperson v. Arkansas, 393 U.S. 97 (1968) 13
Eskridge v. Washington State Board, 357 U.S. 12 (1956) 20

PAGE

Gideon v. Wainwright, 372 U.S. 335 (1963) 20
Griffin v. Illinois, 351 U.S. 12 (1956) 20
Griswold v. Connecticut, 381 U.S. 479 (1965) 16
Guinn v. United States, 238 U.S. 347 (1915) 7

Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966) 7

Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952) 11

Lane v. Brown, 372 U.S. 477 (1963) 20

Meek v. Pittenger, 421 U.S. 349 (1975) 12
Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) 23

Parker Seal Company v. Cummins, 516 F. 2d 544, cert. granted, —— U.S. ——, 96 S. Ct. 1409 (1976) 11
Planned Parenthood of Central Missouri v. Danforth, —— U.S. ——, 96 S. Ct. 2831 (1976) 9
Pollock v. Farmers' Loan and Trust Co., 158 U.S. 429 (1895) 6
Pollock v. Williams, 322 U.S. 4 (1944) 7

Roe v. Wade, 410 U.S. 113 (1973) 3, 5, 6, 9, 10, 13, 16, 21, 22

San Antonio School District v. Rodriguez, 411 U.S. 1 (1973) 19
Shapiro v. Thompson, 394 U.S. 618 (1969) 21, 22, 23
Shelley v. Kraemer, 334 U.S. 1 (1948) 7
Sherbert v. Verner, 374 U.S. 398 (1963) 19
Singleton v. Wulf, — U.S. —, 96 S. Ct. 2868 (1976) 10
Smith v. Allwright, 321 U.S. 649 (1944) 7
Speiser v. Randall, 357 U.S. 513 (1958) 19
State Commissioner of Education v. School Committee, 358 Mass. 776, cert. den. 401 U.S. 929 (1971) 8
Stein v. Oshinsky, 224 F. Supp. 757, aff'd 348 F. 2d 999, cert. den. 382 U.S. 957 (1965) 8

PAGE

Taylor v. Georgia, 315 U.S. 25 (1942) 7
Tinker v. Des Moines School Board, 393 U.S. 503 (1969) 19
Torcaso v. Watkins, 367 U.S. 488 (1961) 11, 19

United States v. Vuitch, 402 U.S. 62 (1971) 14

Walz v. Tax Commission, 397 U.S. 664 (1970) 11
West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) 12
Wisconsin v. Yoder, 406 U.S. 205 (1972) 11

Statutes:

42 U.S.C. 300a 12

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IN THE

Supreme Court of the United States

October Term, 1976

No. 75-442

JOHN H. POELKER, Mayor of the City of St. Louis, Missouri, and R. DEAN WOCHNER, M.D., Director of Health and Hospitals and Acting Commissioner of Hospitals of the City of St. Louis, Missouri,

Petitioners,

v.

JANE DOE, and A CLASS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF AMERICAN JEWISH CONGRESS, BOARD OF CHURCH AND SOCIETY OF THE UNITED METHODIST CHURCH, NATIONAL WOMEN'S CONFERENCE OF THE AMERICAN ETHICAL UNION, NEW YORK STATE COUNCIL OF CHURCHES, UNION OF AMERICAN HEBREW CONGREGATIONS and UNITARIAN UNIVERSALIST WOMEN'S FEDERATION, *Amici Curiae*

This brief *amici curiae* is submitted with the consent of the parties.

Statement of the Case

This class action was initiated by Jane Doe in the U.S. District Court, Eastern District, Eastern Division of Missouri, against John H. Poelker, Mayor of St. Louis, and Dr. R. Dean Wochner, the City Director of Health and Hospitals. Plaintiff alleged that she was an indigent citizen of St. Louis, that she was pregnant, and that she had sought and been refused a non-therapeutic abortion in the city's hospitals. (She later secured an abortion at a private clinic.) She sought declaratory and injunctive relief against the policies, rules and staffing procedures in the city hospitals.

In March 1974, the District Court dismissed the complaint for lack of standing. That order was reversed and the case remanded by the Eighth Circuit Court of Appeals. The District Court then found for the city and the plaintiff appealed, claiming an infringement on her right of privacy and a violation of the Equal Protection Clause of the Fourteenth Amendment of the Constitution. She claimed that the policy of the city to refuse such abortions and the staffing procedure that resulted in the hospital being staffed only by physicians associated with a Catholic Jesuit university, who were prohibited for moral and religious reasons from performing the abortions, resulted in the denial of equal protection to indigent women.

The Court of Appeals declared on April 14, 1975, that the city's policy of prohibiting all non-therapeutic abortions was an unconstitutional infringement on a woman's right of privacy and a denial of equal protection to indigent

women. The court further found that the method of staffing the hospital clinics with physicians who for religious and moral reasons would not perform abortions, resulted in constitutional violations. It remanded the case to the District Court for declaratory relief, including a change in the staffing procedures in order to insure the availability of abortions for indigent women. However, the court indicated that no one may be forced to perform an abortion if it violated his or her religious or personal beliefs.

The defendants' petition for writ of certiorari was granted by this Court.

Interest of the *Amici*

The organizations joining in this brief neither favor nor oppose abortion. They believe that a woman's decision on whether to undergo abortion must be her own, uncoerced by government. They believe further that the principle of religious freedom forbids government to impose upon all the theology of one or more sects. For these reasons, they joined in submitting to this Court a brief *amici curiae* in *Roe* v. *Wade,* 410 U.S. 113 (1973) and *Doe* v. *Bolton,* 410 U.S. 179 (1973). They believe that reversal of the judgment in the case before this Court would impair these principles and would substantially impair what the Court sought to accomplish in those cases. Finally, they believe that reversal of the judgment would effect inequitable discrimination against the poor, depriving them solely because of their poverty of a right this Court has held to be possessed by all women. Accordingly, they respectfully submit this brief *amici curiae.*

The Question to Which This Brief Is Addressed

This brief is addressed to the single question whether, consistent with the Supremacy Clause (Article VI) of the United States Constitution and the First and Fourteenth Amendments, a municipal hospital may deny, solely for reasons it deems religious and moral, abortion services to economically deprived women who are unable to pay for them in other hospitals.

Summary of Argument

1. The action by the mayor of St. Louis in forbidding abortions in municipal hospitals violates the Supremacy Clause, which declares that the Constitution is the supreme law of the land. The Constitution provides for an amendment procedure which allows the people to overrule Supreme Court decisions. Inability to achieve this end by reason of the fact that a specific Court decision may be consistent with rather than opposed to the popular will often leads to efforts to nullify the decision through varieties of schemes and devices such as the mayor's dictate in the present case. Success in that effort here would result in an effective nullification of a freedom secured by the Bill of Rights and would make a mockery of the Supremacy Clause.

2. The mayor's action violates the First Amendment's dual guaranty of church-state separation and the free exercise of religion by imposing upon the entire community the religious doctrine of those to whom abortions are sinful. This unconstitutional imposition cannot be justified on the

claim that abortion is immoral any more than a law banning the use of contraceptives can be so justified. In either case, the claim of immorality is no more than an effort to impose upon the entire community the religious doctrines of a particular group. This is particularly true where, as in both cases, the majority of Americans do not consider the practice to be immoral.

3. The mayor's action constitutes discrimination against the poor. It deprives them of a procedure which is not unlawful and is readily and legally available to those who are financially able to obtain it at private hospitals. Freedoms secured by the Bill of Rights are not the exclusive possession of those who are fortunately financially able to pay for them.

ARGUMENT

I

The action by the mayor of St. Louis in forbidding abortions in municipal hospitals violates the Supremacy Clause (Article VI) of the Constitution.

Roe v. *Wade*, 410 U.S. 113 (1973), and *Doe* v. *Bolton*, 410 U.S. 179 (1973), are hardly the first decisions declaring unconstitutional a particular state or federal statute which have aroused strongly articulated opposition. Indeed, the history of this Court indicates that there has hardly been a significant constitutional law decision which has not aroused from some group or other protests as intense as those which have been met by *Wade* and *Bolton*. The Court's first significant decision in constitutional law,

Chisholm v. *Georgia,* 2 Dall. (2 U.S.) 419 (1793), aroused a storm of controversy which, *mutatis mutandis,* equaled if it did not exceed in extent and intensity that experienced by *Wade* and *Bolton.* 1 C. Warren, The Supreme Court in United States History, 96 *et seq.* (Warren notes, at p. 100, that the Georgia House of Representatives passed a bill providing that any Federal marshal or other person who executed any process issued by the Supreme Court in the *Chisholm* case should be declared "guilty of felony and shall suffer death, without benefit of clergy, by being hanged.")

Similar opposition, varying in degrees of intensity, was experienced by such decisions as *Dred Scott* v. *Sanford,* 19 How. (60 U.S.) 393 (1857), and *Pollock* v. *Farmers Loan and Trust Co.,* 157 U.S. 429 (1895). 3 Warren 24-41, 422. But in each of these cases the opposition resulted in constitutional amendments, the 11th, 13th and 16th respectively, nullifying the Court's decisions. This is the procedure sanctioned by Article V of the Constitution for lawfully and effectively nullifying Court decisions which contravene the will of the people. What the Constitution does not sanction is nullification through defiance and evasion.

Overt defiance is fortunately rare. When it does occur, as in the events dealt with in *Cooper* v. *Aaron,* 358 U.S. 1 (1958), the reaction of the government and people of the United States quickly and adequately frustrates it. More frequent and considerably more difficult to handle are efforts by legislatures and governmental officials who, while paying lip service to the Court's mandate, seek to frustrate or limit it by evasive devices such as the one involved in the

present case. The history of the 13th, 14th and 15th Amendments is replete with illustrations.

In *Bailey* v. *Alabama,* 219 U.S. 219 (1911), the Court declared unconstitutional under the 13th Amendment, a state statute imposing criminal penalties against defaulting sharecroppers or other plantation workers. To the same effect, see *Taylor* v. *Georgia,* 315 U.S. 25 (1942), and *Pollock* v. *Williams,* 322 U.S. 4 (1944). In *Guinn* v. *United States,* 238 U.S. 347 (1915), the device of grandfather clauses was held to be an impermissible effort to evade the 14th and 15th Amendments. The same result was reached in respect to poll taxes in *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663 (1966). White primaries, racial restrictive covenants and separate but equal educational facilities, invalidated respectively in *Smith* v. *Allwright,* 321 U.S. 649 (1944); *Shelley* v. *Kramer,* 334 U.S. 1 (1948), and *Brown* v. *Board of Education,* 347 U.S. 483 (1954), are further examples of the same efforts at frustration and evasion which this Court has struck down.

What these and many other cases that might be cited indicate in respect to the rights of racial minorities is that inability to overrule decisions of the Court through constitutional amendment by reason of the fact that they may be consistent with rather than opposed to the popular will of the American people as a whole often leads to efforts to nullify them through schemes and devices formulated by imaginative executives and legislators and their legal advisers. In the same pattern and perhaps closer to home are the devices experimented with in efforts to nullify or evade the Court's decisions forbidding prayer recitation and devotional Bible reading in the public schools. *Engel*

v. *Vitale,* 370 U.S. 421 (1962); *Abington School District* v. *Schempp,* 374 U.S. 203 (1963).

As in the present case, the initial efforts to overrule those decisions were through constitutional amendment. See Hearings Before the Committee on the Judiciary, House of Representatives, 88th Congress, Second Session on Proposed Amendments to the Constitution Relating to Prayers and Bible Reading in the Public Schools, April 22-June 3, 1964, Serial No. 9. These proving ineffective, the next step, as in respect to the civil rights decisions, was through devices of evasion and avoidance. These included the so-called "cookie prayer", recited by kindergarten children before their morning snack, from which the word "God" was removed; pupil or parent initiated prayers; and classroom reading of the daily opening prayers of the Senate or House of Representatives as printed in the Congressional Record. In all these cases, as in others, the lower courts held that these patent efforts to evade the *Engel-Schempp* decisions could not stand, and in all the instances that the cases reached this Court the lower courts' decisions were upheld. *DeKalb School District* v. *DeSpain,* 255 F. Supp. 655, affirmed 384 F. 2d 836, certiorari denied 390 U.S. 906 (1968); *Stein* v. *Oshinsky,* 224 F. Supp. 757, affirmed 348 F. 2d 999, certiorari denied 382 U.S. 957 (1965); *State Commissioner of Education* v. *School Committee,* 358 Mass. 776, certiorari denied 401 U.S. 929 (1971); *Board of Education of Netcong, N.J.* v. *State Board of Education,* 108 N.J. Super. 564, 262 A. 2d 21, affirmed 57 N.J. 172, 270 A. 2d 312, certiorari denied 401 U.S. 1013 (1971).

The present case illustrates the same pattern. During the 1975-76 session of Congress more than 50 resolutions

were introduced in the House of Representatives aimed at voiding *Wade* and *Bolton.* (Among others were H.J. Res. 96, 99, 121, 132, 197, 246, 422, 681.) See also Constitutional Aspects of the Right to Limit Childbearing, Report of the United States Commission on Civil Rights, April 1975. None of these, of course, has succeeded, nor is likely to succeed. This is hardly surprising in view of the fact that polls consistently show that the majority of Americans support rather than oppose the *Wade* and *Bolton* decisions. Hence, as in respect to the rights of racial minorities and Bible and prayer in the public schools, comes the next step of evasion and avoidance.

In point of time, the first instance of this development in respect to abortion was in the case of *Commonwealth* v. *Edelin,* now before the Supreme Judicial Court of Massachusetts (Suffolk County; Sitting, 1975, No. 393). This deals with a prosecution for homicide instituted against a reputable physician using accepted medical procedure to provide a woman with an abortion which she voluntarily sought and which this Court held she had a constitutional right to obtain and the defendant had a constitutional right to provide.

Planned Parenthood of Central Missouri v. *Danforth,* —— U.S. ——, 96 S. Ct. 2831 (1976), represents another instance of attempted frustration and avoidance. There this Court held unconstitutionally violative of the *Wade-Bolton* principles a statute requiring spousal or parental consent to an abortion and forbidding the use of the most commonly used, effective and safe abortion procedure. See also *Bellotti* v. *Baird,* —— U.S. ——, 96 S. Ct. 2857 (1976).

Another instance, also arising in Missouri, is the action of the state legislature prohibiting Medicaid payments to women receiving welfare benefits who had undergone non-therapeutic abortions while, at the same time, allowing such payments to women welfare recipients who carried their pregnancies to term. See *Singleton* v. *Wulf*, —— U.S. ——, 96 S. Ct. 2868 (1976).

The present case represents still another instance, and one which it may safely be presumed will not be the last, of governmental effort to frustrate or limit the decisions in *Wade* and *Bolton*. If it succeeds it can only be partially effective, for it will not prevent abortions for women who can afford to pay for them or to travel to another state or city where they are easily available. (*Cf. Bigelow* v. *Virginia*, —— U.S. ——, 95 S. Ct. 2222 (1975), invalidating a statute forbidding advertisements of out-of-state abortion services.) As we seek to establish later in this brief, this partial effectiveness results in unconstitutional discrimination against the poor. Here, however, we urge only that, should it succeed, it would result in an effective nullification of a freedom secured by the Bill of Rights to the poor no less than the well-to-do and would make a mockery of the Supremacy Clause.

II

The mayor's action challenged herein violates the First Amendment's dual guaranty of church-state separation and the free exercise of religion.

There are instances where the dual First Amendment guaranties of church-state separation and freedom of religious exercise are or appear to be in conflict with each other, calling upon or apparently calling upon the courts to make a choice between them. See, *e.g., Walz* v. *Tax Commission*, 397 U.S. 664 (1970) (tax exemption for churches); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972) (compulsory attendance at secondary schools); *Parker Seal Company* v. *Cummins*, 516 F. 2d 544, certiorari granted, —— U.S. ——, 96 S. Ct. 1409) ("Religious Accommodation" amendment to 1964 Civil Rights Act). Whether or not these cases present real conflict is by no means certain but, in any event, if they do, they constitute the exception rather than the rule. In the overwhelming majority of cases, the dual guaranties of the Amendment support rather than conflict with each other. See, *e.g., Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94 (1952); *Torcaso* v. *Watkins*, 367 U.S. 488 (1961).

The last cited case is particularly apposite. There the Court held violative of both guaranties in the Religion Clause of the First Amendment a state statute barring from public office any person who refused to take an oath that he believed in the existence of God. The Court reached this conclusion notwithstanding the fact that the plaintiff was an avowed atheist and therefore had no religion, at least as that term is generally understood. Just as freedom of

speech guarantees equally freedom of nonspeech (*West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624 (1943)), so the Court held, does freedom of religion guaranty freedom of nonreligion or, as often stated, freedom from religion.

(It need hardly be noted that requiring municipal hospitals to furnish abortion services does not impair the religious freedom of any physicians, nurses or other hospital employees whose religious conscience forbids them to participate in an abortion procedure. Both by federal statute (42 U.S.C. 300a) and by similar statutes in practically every state in the Union, no sanction can be imposed for refusal because of religious conscience to participate in an abortion procedure. See, Stern, Abortion Conscience Clauses, 11 *Col. Journ. of L. and Social Probl.* 571 (1975).)

The mayor's action in forbidding abortions in St. Louis municipal hospitals violates not only the Free Exercise Clause but also the Establishment Clause by imposing upon the entire community the religious doctrine of those to whom abortions are sinful. In *Meek* v. *Pittenger,* 421 U.S. 349 (1975), the Court set forth the following test as a distillation of its efforts over the past decades to evaluate a wide range of governmental action challenged as violative of the constitutional prohibition against laws respecting an establishment of religion:

> First, the statute must have a secular legislative purpose. E.g., *Epperson* v. *Arkansas,* 393 U.S. 97. Second, it must have a "primary effect" that neither advances nor inhibits religion. E.g. *School District of Abington Township* v. *Schempp,* 374 U.S. 203. Third,

> the statute and its administration must avoid excessive government entanglement with religion.

Although the Court spoke in terms of "statute", the same principles and the same three-pronged test are applicable to executive action. *Anderson* v. *Laird,* 466 F. 2d 283 (D.C. Cir. 1972), certiorari denied, 409 U.S. 1076 (1972); *Cruz* v. *Beto,* 405 U.S. 319 (1972).

Epperson v. *Arkansas,* 393 U.S. 97 (1968), cited by the Court as an instance of a law which failed to pass the secular legislative purpose test, is particularly relevant here. It shows how a law, though neutral on its face, must be declared unconstitutional under the Establishment Clause if an examination of its historical background establishes that its purpose was to advance religion. The statute made it unlawful for a teacher in any state-supported school or university "to teach the theory or doctrine that mankind ascended or descended from a lower order of animals."

The Court, on the basis of its examination into the events preceding and contemporary with the enactment of the statute, reached the conclusion that "there can be no doubt that Arkansas has sought to prevent its teachers from discussing the theory of evolution because it is contrary to the belief of some that the Book of Genesis must be the exclusive source of doctrine as to the origin of man." 393 U.S. 97 at 107.

The historical background of anti-abortion laws is set forth in some detail in *Wade,* 410 U.S. at 130-141, and need not be repeated here. The religious origin and purpose of these laws has been widely recognized by scholars and

jurists alike.[1] Justice Douglas noted this in his dissenting opinion in *United States* v. *Vuitch*, 402 U.S. 62, 78-79 (1971):

> Abortion statutes [he said] deal with conduct which is heavily weighted with religious teachings and ethical concepts. Mr. Justice Jackson once spoke of the "treacherous grounds we tread when we undertake to translate ethical concepts into legal ones, case by case." . . . The difficulty and danger are compounded when religion adds another layer of prejudice. The end result is that juries condemn what they personally disapprove. (Citations omitted.)

Substituting the word "mayors" for "juries" in the last sentence makes the quotation particularly apposite here.

Justice Douglas quoted the following from an article by former Justice Clark (at 79, n. 2):

> Throughout history religious belief has wielded a vital influence on society's attitude regarding abortion. The religious issues involved are perhaps the most frequently debated aspects of abortion. At the center of the ecclesiastical debate is the concept of "ensoulment" or "personhood," i.e., the time at which the fetus becomes a human organism. The Reverend Joseph F. Donseel of Fordham University admitted that no one can determine with certainty the exact moment at which "ensoulment" occurs, but we must deal with the moral problems of aborting a fetus even if it has not taken place. Many Roman Catholics believe that the soul is a gift of God given at conception. This leads to the conclusion that aborting a pregnancy at any time amounts to the taking of a human life and is therefore against the will of God. Others, including some Catholics, believe that abortion should be legal until the baby is viable, i.e., able to support itself outside the womb. In balancing the evils, the latter concluded that the evil of destroying the fetus is outweighed by the social evils accompanying forced pregnancy and childbirth. Religion, Morality, and Abortion: A Constitutional Appraisal, 2 Loyola U.L. Rev. (L.A.) 1, 4 (1969).

1. See D. Callahan, Abortion: Law, Choice and Morality, Ch. 12 (1970); J. Noonan, Contraception (1965); Noonan, "Abortion and the Catholic Church: A Summary History," 12 National Law Forum 85-131 (1967); R. J. Huser, The Crime of Abortion in Canon Law (1942). See also Tietze and Lewitt, "Abortion," 220 Scientific American 21 (January, 1969) where opposition to abortion is traced to the rise of the Jewish and Christian religions.

It is true that the arguments presented by advocates of return to anti-abortion laws are often presented in terms of morality rather than religion or theology; it could hardly be otherwise in a nation with a strong commitment to the separation of church and state. But, as the Court said in *Bigelow* v. *Virginia*, "A State cannot foreclose the exercise of constitutional rights by mere labels." —— U.S. ——, 95 S. Ct. at 2235 (1975). The association of religion and morals is widely accepted, particularly among those with religious commitments. The "morality" plays of Elizabethan England were religious plays. Jefferson called God "the author of all the relations of morality."[2] Clergymen and educators today commonly speak of "moral and spiritual values." The Catholic Church affirms its infallibility in teaching doctrines of "moral and spiritual values," and the Baltimore Catechism defines a "doctrine of faith or morals" as "a truth revealed by God dealing with what we must believe or what we must do in order to be saved."[3] It is no mere coincidence that positions on the morality or immorality of abortion vary among religious groups in con-

2. 1 A.P. Stokes, *Church and State in the United States* 337 (1950).

3. 1949 Edition, p. 127.

formity to their religious commitments. No church whose doctrine or discipline forbids abortion holds it to be moral; and no church whose doctrine or discipline permits abortion deems it to be immoral.[4]

In the present case, the mayor has sought to impose upon the entire community the religious doctrine of those to whom abortions are sinful. This unconstitutional imposition cannot be justified on the claim that abortion is immoral any more than a law banning the use of contraceptives can be so justified. *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972). In either case the claim of immorality is no more than an effort to compel the entire community to conform to the religious doctrines of a particular group. That is particularly true where, as in both cases, the majority of Americans do not consider the practice to be immoral.

Little need be added to show that the effect, or at the very least a primary effect, of the mayor's action is to advance the religious doctrine of those who hold abortions to violate God's law. It imposes upon those who do not share his view the theology of those who do. If establishment of religion means anything, it means imposing on all the community the theology of some, and it is immaterial whether the theology is that of a majority of the community, or whether it is frankly designated as theology or labeled

4. A brief *amici curiae* in support of the appellants' position in *Wade* and *Bolton* was filed by the following organizations: American Ethical Union, American Friends Service Committee, American Humanist Association, American Jewish Congress, Episcopal Diocese of New York, New York State Council of Churches, Union of American Hebrew Congregation (Reform), Unitarian Universalist Association, United Church of Christ, and Board of Christian Social Concerns of the United Methodist Church.

morality. As Justice Clark said in the article from which we have already quoted:

> Despite the fact that religious belief continues to permeate our attitude toward abortion, most people today agree with Justice Holmes that "moral predilections must not be allowed to influence our minds in settling legal distinctions." (O.W. Holmes, the Common Law)[5]

Nor need much be said in respect to government entanglement in religious controversy and political division along religious lines, the avoidance of which was one of the major purposes of the Establishment Clause. No one exposed to newspapers, periodicals and other media of public communication can be unaware of the religious acrimony and religio-political divisiveness brought on by the abortion controversy. Framing the controversy in terms of morals aggravates rather than ameliorates the conflict, for it implies that those religious groups who oppose coercive anti-abortion governmental action support or at least condone immorality.

We conclude this section of our brief by noting that abortion is not the only medical procedure unacceptable to some religious groups. While abortion is not acceptable to Catholics, some Protestants and Orthodox Jews, blood transfusions are deemed sinful by Jehovah's Witnesses. Suppose at the next election in St. Louis the petitioner herein were replaced by a member of the Jehovah's Wit-

5. 2 Loyola L. Rev. (L.A.) at p. 6. It is significant that Justice Clark was the author of the opinion in *Abington School District* v. *Schempp*, *supra*, in which the purpose and effect test was formulated. It is obvious that the author of the establishment test does not consider anti-abortion laws and regulations consistent with it.

nesses sect. Can it be argued that, consistent with the First Amendment, he could forbid transfusions at municipal hospitals? Or suppose he were a Christian Scientist who believed consumption of fluoridated water to be sinful. Could he constitutionally ban its use in municipal hospitals? We can see no constitutional distinction between these hypothetical instances and the present case. All raise the same basic issue: Does the First Amendment sanction imposition by a public official of his own religious prohibitions upon the entire community? The question, we suggest, answers itself, for if the answer is yes we may be on our way back to the Peace of Augsburg and its Erastian principle, *cujus regio, ejus religio,* whereunder the religion of a province is determined by the religion of its prince. M. E. Marty, A Short History of Christianity (1959) 243.

III

The mayor's action constitutes discrimination against the poor in violation of the Equal Protection Clause of the Fourteenth Amendment by denying to them a procedure readily and lawfully available to the economically advantaged.

We do not, of course, claim that a municipal hospital is constitutionally obligated to provide all procedures available at private hospitals. Obviously it may not be required to provide cosmetic operations. We urge only that exclusion of a procedure that is readily and lawfully available to the economically advantaged at private hospitals, for no reason other than the mayor's individual religious and moral commitments, deprives the poor of the equal protection of the laws in violation of the Fourteenth Amendment.

Nor do we urge that access to free municipal hospital services is a right rather than a privilege. *Cf. San Antonio School District* v. *Rodriguez,* 411 U.S. 1 (1973). However they may be designated, they may not be withheld on the basis of constitutionally impermissible classifications such as speech, association, religion or race. "The appellees," this Court said in *Speiser* v. *Randall,* 357 U.S. 513 (1958), "are plainly mistaken in their argument that, because a tax exemption is a 'privilege' or 'bounty', its denial may infringe speech," and this principle is no less applicable to religious barriers to other governmental benefits or opportunities. *Torcaso* v. *Watkins,* 367 U.S. 488, 495-496 (1961). The Court was quite clear on this point in *Sherbert* v. *Verner,* 374 U.S. 398 (1963), where it said (at p. 404):

> Nor may the South Carolina court's construction of the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's "right" but merely a "privilege." It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.

What we urge is that the mayor's action barring from municipal hospitals women seeking abortion procedures which he deems religiously or morally unacceptable but which are available in private hospitals to the economically advantaged violates the Fourteenth Amendment no less than barring from attendance at free public schools students who manifested their opposition to our participation in the Vietnam war by wearing black armbands. See *Tinker* v. *Des Moines School Board,* 393 U.S. 503 (1969).

While decided under the Due Process rather than the Equal Protection Clause of the Fourteenth Amendment,

we believe apposite the seminal decision in *Gideon* v. *Wainwright,* 372 U.S. 335 (1963), holding that the states must provide free legal services to poor persons accused of crime. Even more relevant, since decided under the Equal Protection as well as the Due Process Clause of the Fourteenth Amendment, are decisions such as *Griffin* v. *Illinois,* 351 U.S. 12 (1956), and *Douglas* v. *California,* 372 U.S. 353 (1963), holding that indigent defendants appealing convictions were constitutionally entitled respectively to free trial transcripts and services of counsel. See also, *Eskridge* v. *Washington State Board,* 357 U.S. 12 (1956); *Draper* v. *Washington,* 372 U.S. 487 (1963); *Lane* v. *Brown,* 372 U.S. 477 (1963). Cogent and relevant here is the Court's statement in *Douglas* v. *California, supra* (372 U.S. at 357-358):

> There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself.

Perhaps even more relevant (since it might be argued that, whereas the state compels persons to defend themselves in criminal cases, it does not compel them to bear or not to bear children) is *Boddie* v. *Connecticut,* 403 U.S. 371 (1971). There the Court held unconstitutionally discriminatory against the poor the denial of access to divorce proceedings by persons unable to pay the requisite court fees. The case would perhaps be closer to the present one but hardly less cogent if the prohibition of free access to the

divorce court were based on the lawmaker's belief that divorce was both contrary to God's will and immoral. Or, to suggest an instance even closer to the present one, suppose the petitioner herein, in his capacity as mayor of St. Louis, ordered the city's magistrates and clerks not to solemnize marriages of divorced persons because he deemed them contrary to religion and morality. The point is that, since the mayor's religious beliefs are constitutionally irrelevant and, since this Court ruled in *Wade* and *Bolton* that abortions are not immoral, the mayor's denial of abortion services to economically disadvantaged women at municipal hospitals because he deems such services to be immoral denies to them the equal protection of the laws to the same extent as a similarly motivated denial to economically disadvantaged divorced persons of the right to the services of a magistrate or clerk for the solemnization of further marriages.

Most cogent and relevant to the present case is the Court's decision in *Shapiro* v. *Thompson,* 394 U.S. 618 (1969), wherein the Court struck down as invidious discrimination, violative of the Equal Protection Clause, a statutory prohibition of welfare benefits to persons resident in the state for less than a year. After holding that it was irrelevant whether welfare benefits be deemed a right or a privilge (footnote 6), the Court addressed itself to the question whether there was a justification for the discrimination against the new residents sufficient to meet the challenge under the Fourteenth Amendment.

A state, the Court held, has a valid interest in preserving the fiscal integrity of its programs, and may legitimately

attempt to limit its expenditures whether for public assistance, public education, or any other program.

> But [the Court continued] a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools. Similarly . . . appellants must do more than show that denying welfare benefits to new residents saves money. *The saving of welfare costs cannot justify an otherwise invidious classification.* 394 U.S. at 633 (Emphasis added.)

By reason of the First Amendment, the religious impermissibility of abortions may not give rise to legal consequences. Under *Wade* and *Bolton,* an abortion is as morally neutral as traveling from state to state to obtain more advantageous welfare benefits. In neither case can a state under the Equal Protection Clause deny the service because it disapproves of the applicant's motivation. Moreover, under *Shapiro* v. *Thompson,* the saving of welfare costs (even if it be assumed that it would be more expensive for the city to finance abortions than to care for unwanted abandoned infants) cannot justify an otherwise invidious classification. Even under traditional equal protection criteria, the Court held further, a classification of welfare applicants according to whether they had lived in the state for one year would seem irrational and unconstitutional. So too, we suggest, would a classification according to whether they seek abortion or other hospital services. In any event, the Court continued in *Shapiro* v. *Thompson,* since the classification touched on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a compelling state interest. The right to an abortion, we believe, is no

less fundamental. With equal clarity, both violate the Equal Protection Clause.

Perhaps even more relevant and cogent is *Memorial Hospital* v. *Maricopa County,* 415 U.S. 250 (1974). There the Court struck down as violative of the Equal Protection Clause a state statute requiring a year's residence in a county as a condition to an indigent's receiving nonemergency hospital or medical care at the county's expense. On the authority of *Shapiro* v. *Thompson,* the Court held that the state's burden of establishing a compelling state interest was not met by the claim that the requirement was necessary to inhibit migration of indigents, deter them from taking up residence solely to utilize medical facilities, protect residents whose taxes financed maintenance and operation of the hospital, prevent fraud and assure budget predictability.

If a mayor may not consistent with the Fourteenth Amendment deny access to free hospital and medical services by reason of the applicant's recent arrival into the community, we are unable to see how he may to do so by reason of his dislike of the type of the lawful hospital and medical services the applicant seeks.

Conclusion

For the foregoing reasons the judgment of the court below should be affirmed.

Respectfully submitted,

Leo Pfeffer
15 East 84th Street
New York, New York 10028
(212) 879-4500

Attorney for Amici Curiae

September, 1976

Supreme Court, U. S.
FILED
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No. 75-442

In the Supreme Court of the United States

OCTOBER TERM, 1975

HONORABLE JOHN H. POELKER, Mayor of the City of St. Louis, et al.,

Petitioners,

vs.

JANE DOE, et al.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

MOTION AND BRIEF, AMICUS CURIAE OF AMERICANS UNITED FOR LIFE, INC. IN SUPPORT OF PETITIONER JOHN H. POELKER

DENNIS J. HORAN
PATRICK A. TRUEMAN
DOLORES V. HORAN
JOHN D. GORBY
VICTOR G. ROSENBLUM
230 North Michigan Ave.
Chicago, Illinois 60601
312 263-5386
Attorneys for AMERICANS UNITED FOR LIFE, INC.

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

INDEX

	PAGE
Table of Citations	i
Motion	1
Brief	5
Note	5
Argument	6
Conclusion	18

TABLE OF CITATIONS

Cases

Bodie v. Connecticut, 401 U.S. 371 (1971)	16
Dandridge v. Williams, 397 U.S. 471 (1970)	8, 10, 11
Doe v. Bolton, 410 U.S. 179 (1973)	10, 14
Doe v. Poelker, 515 F. 2d 546 (8th Cir. 1975)	6, 10, 14
Eisenstadt v. Baird, 405 U.S. 438 (1972)	9
Griffin v. Illinois, 351 U.S. 12 (1956)	16
Gomez v. Perez, 409 U.S. 535 (1973)	9
Levy v. Louisiana, 391 U.S. 68 (1968)	9
Meyer v. Nebraska, 262 U.S. 390 (1923)	14
Ownby v. Morgan, 256 U.S. 94 (1921)	10
Paris Adult Theater v. Slaton, 413 U.S. 49 (1973)	15
Planned Parenthood v. Danforth	10

PAGE

Roe v. Wade, 410 U.S. 113 (1973) 6, 7, 8, 10, 11, 12, 13, 14, 15

Shapiro v. Thompson, 394 U.S. 618 (1969) 8, 9, 10, 11, 12

Skinner v. Oklahoma, 316 U.S. 535 (1942) 9

Stanley v. Georgia, 394 U.S. 557 (1969) 15

Terry v. Adams, 345 U.S. 461 (1953) 12

U.S. v. Orito, 413 U.S. 139 (1973) 15

U.S. v. Reidel, 402 U.S. 351 (1971) 15

U.S. v. 12 200-ft. Reels, 413 U.S. 123 (1973) 15

Weber v. Aetna Casualty and Surety, 406 U.S. 164 (1972) 9

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

PURPOSE OF THIS MOTION

Eugene P. Freeman, attorney for John H. Poelker has given consent for the filing of this amicus brief. Frank Susman the attorney for Jane Doe does not object to the filing of this amicus brief. Letters from each attorney stating the above has been filed with the Clerk of this Court.

INTEREST OF THE AMICI

Americans United for Life (AUL) is a national educational foundation organized to educate and promote better understanding of the humanity of the unborn and the value of human life. Its national office is located in Chicago, Illinois, and its membership includes approximately 20,000 persons located in every state of the union.

The Board of Directors and Officers of Americans United for Life include the following:

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Minneapolis, Minnesota

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Loyola University, Chicago
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PROF. DAVID W. LOUISELL
Law
University of California
LORE MAIER
Toledo, Ohio
MARJORY MECKLENBURG
Minneapolis, Minnesota
KENNETH M. MITZNER, PH.D.
Los Angeles, California
DR. JACOB A. O. PREUS, President
The Lutheran Church—Missouri Synod
St. Louis, Missouri
HERBERT RATNER, M.D.
Child & Family Quarterly
Oak Park, Illinois
PROF. VICTOR G. ROSENBLUM
Law—Political Science
Northwestern University

JOSEPH R. STANTON, M.D.
Boston, Massachusetts
PROF. GEORGE H. WILLIAMS
Divinity—Church History
Harvard University

This brief Amicus Curiae is filed in support of Mayor John H. Poelker and also filed to present the arguments to this Court that Equal Protection does not require abortion on demand nor does it require public hospitals to perform abortions which are not medically indicated.

Respectfully submitted,

DENNIS J. HORAN
PATRICK A. TRUEMAN
DOLORES U. HORAN
JOHN D. GORBY
VICTOR G. ROSENBLUM
Attorneys for Americans United for Life
230 North Michigan Ave.
Chicago, Illinois 60601
(312) 263-5386

August 20, 1976.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-442

HONORABLE JOHN H. POELKER, Mayor of the City of St. Louis, et al.,
Petitioners,

vs.

JANE DOE, et al.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF AMICI CURIAE

NOTE

The Questions Presented and The Statement of the Case are omitted from this Amicus Curiae Brief since they are amply stated in the Brief of Petitioner, the Honorable John H. Poelker.

ARGUMENT

EQUAL PROTECTION DOES NOT REQUIRE ABORTION ON DEMAND AND DOES NOT REQUIRE PUBLIC HOSPITALS TO PERFORM NON-MEDICALLY INDICATED ABORTIONS.

The Court below found the City of St. Louis policy excluding non-medically indicated abortions from its public hospitals "a denial of equal protection to indigent pregnant women." 515 F.2d at 546. On this basis the Eighth Circuit Court of Appeals held the hospital policy unconstitutional; mandated that the hospital provide abortion facilities and services even to the extent of hiring physicians who would agree to perform abortions; and awarded attorney's fees personally against the Mayor of St. Louis on the theory of vexatiousness.

This case involves one of the most important issues arising under *Roe* v. *Wade,* 410 U.S. 113 (1973). In *Roe* v. *Wade,* this court found in the constitutional right of privacy, a right of a woman in consultation with her physician to make the decision to abort. In *Roe,* this court emphasized that the decision was one which involved the medical judgment of the physician. *Roe* v. *Wade* does not require abortion on demand.

The instant case presents this court squarely with the issue of whether a woman may demand an abortion of a public institution where the physicians explicitly disagreed with that decision and concluded that no medical reasons existed to warrant an abortion. Must a public hospital provide abortions on demand?

This Court in *Roe* was careful to note that:

> The abortion decision in all its aspects is inherently and primarily a *medical decision* and basic responsibility for it must rest with the physician. *Roe* at 166, (Emphasis added).

Chief Justice Burger was in agreement with this statement when he said:

> The vast majority of physicians observe the standards of their profession and act only on the basis of carefully deliberated medical judgments relating to life and health. *Roe* at 208.

Thus the abortion decision is a "medical decision" which cannot be effectuated unless it is arrived at in consultation and in agreement with a physician.

There is no determination in the present case that the abortion was medically necessary. The evidence is to the contrary (Transcript pp. 85, 91, 94, 104, 113). No physician at the city's hospital facilities believed the appellee's claim for an abortion to be warranted and no clear and convincing evidence was offered to show that the physicians' judgment was vitiated by the "practice and procedure" of the city hospitals or that, in fact, their judgment was erroneous. Thus, the physicians themselves did not rely on the policy of the city of St. Louis but instead refused the procedure on the basis that it was not medically indicated. The Circuit Court overturned the decision of the District Court dismissing this action by substituting its judgment for the clinical judgment of the examining physicians. This is contrary to the teachings of *Roe* v. *Wade,* 410 U.S. 113 (1973).

Public hospitals are established to further a *public* policy designed to meet the often urgent and immediate medical requirements of a community, obviously not to satisfy

every possible alternative activity incident to the exercise of private rights. Where a public hospital distinguishes between medically indicated and non-medically indicated abortions, that classification is a reasonable allocation of medical resources and cannot be construed otherwise.

This Court stressed in *Roe,* that abortion is primarily to be viewed as a medical procedure, presumably indistinguishable from other medical procedures requiring similar expertise and posing similar risks to the patient. If it is true that the abortion decision is a medical decision, and if abortion is not akin to a rite which hospitals are universally required to perform by the Constitution, then a hospital policy which excludes abortion should be tested with no greater scrutiny than a policy which excludes cosmetic surgery, open heart surgery, kidney dialysis, heart transplants or any other medical procedure because in the sound discretion of its governing body it is not feasible or simply not within the scope of its public purpose.

Such were the teachings of *Dandridge* v. *Williams,* 397 U.S. 471 (1970) where an exclusion in a governmental program which allegedly burdened the exercise of a private fundamental right (the right to procreate) was subjected not to the strict scrutiny test as in *Shapiro* v. *Thompson,* 394 U.S. 618 (1969) but rather to the traditional analysis.

Indeed, the instant case would not be properly measured by the *Shapiro* test even without the distinction drawn between private fundamental rights and those necessarily exercised in the public forum. The *Shapiro* case involved the infringement of a fundamental right *once exercised* where welfare payments were denied to potential clients who had not established residency. To carry the principals of the instant case urged upon this Court into the context of *Shapiro* would be to propose *not* that states may not

discriminate on the basis of the fundamental right to travel, but that when an indigent decides to travel the state of destination is constitutionally obliged to provide transportation. Further, the appellee in the instant case does not here properly assert a fundamental right. This is so not only because private rights may be vitiated when they enter the public domain, but because the right to abort is a joint right which arises upon the concurrence of woman and physician. No physician in his medical judgment concurred with the appellee so no zone of privacy which might include the right to effectuate an abortional act arose.

This Court's reluctance to apply the standards of *Shapiro* and its progeny to the area of private rights is further reflected in its continued application of traditional standards to discriminations based upon the legitimacy of children. *Weber* v. *Aetna Casualty & Surety,* 406 U.S. 164 (1972); *Levy* v. *Louisiana,* 391 U.S. 68 (1968); *Gomez* v. *Perez,* 409 U.S. 535 (1973). This is so, despite the fact that such classifications arguably affect the right of the individual to procreate, *Skinner* v. *Oklahoma,* 316 U.S. 535, 541-542, (1942), whether married or unmarried, *Eisenstadt* v. *Baird,* 405 U.S. 438, 453 (1972), by establishing separate standards by which the exercise of those private fundamental rights would be measured.

Thus the present case is concerned with a social and economic program which cannot be said to defeat fundamental rights in any meaningful sense. The city's exclusion of non-medically indicated abortion is a classification which should not be subject to strict scrutiny under the Equal Protection Clause. To deny that the state may make distinctions between medically indicated abortions and nonmedically indicated abortions in its social and economic

programs would be to deny to executive and legislative authorities the right to make rational classifications based on valid public interests. It would conflict with this Court's holding in *Roe, Doe* and *Planned Parenthood* v. *Danforth.* It would be anamolous in the context of the nature of "private" rights and cases relied upon in *Roe.* A right to be free from governmental interference in private matters does not imply a reciprocal right to public implementation of private decisions. "The function of the Fourteenth Amendment is negative and not affirmative and it carries no mandate for particular measures of reform." *Ownby* v. *Morgan,* 256 U.S. 94 (1921). The *Shapiro* test is plainly inappropriate. The standards articulated in *Dandridge* may and should be applied to the instant case.

In *Dandridge* traditional standards of equal protection were applied to a governmental program which limited maximum allotment to welfare families, where the primary effect was to burden the *private fundamental right* to procreate. This Court said:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality. . . ." A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. . . . (The application of the traditional test) is a standard that is true to the principle that the Fourteenth Amendment gives the Federal Courts no power to impose upon the States their economic view of what constitutes wise economic policy or social policy. 379 U.S. at 486.

• • •

> Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly including the one before us. But the intractable economic, social, and even philosophical problems presented by public assistance programs are not the business of this Court . . . the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriads of potential recipients. Id. at 487.

We respectfully submit that the principles of *Dandridge* bear directly upon the instant case.

Application of the *Shapiro* standard to this case would cast a burden upon the city hospitals to justify exclusion of nonmedically indicated abortions in a manner which this Court would certainly not require of other medical procedures, and in conflict with this Court's intent in *Roe.* This is so despite the fact that a non-medically indicated or elective abortion is not even akin to cosmetic surgery since there, presumably, the surgeon has concurred in the medical appropriateness of the surgery or he would not perform it.

Even if it were true that abortion in the first trimester poses, in general, a lesser threat to maternal health than childbirth, we safely assume that the city hospitals are under no constitutional obligation to practice "preventative" medicine or pursue generalized medical hypotheses which may not apply to specific patients where the immediate needs of the public require attention. Most first trimester abortions are not performed in hospitals anywhere in America. Instead they are performed in free standing clinics. To demand that the city hospitals conform their practice to the abstractions of actuarial or mortality tables relevant to abortion and childbirth is, we believe,

beyond the proper authority of the federal courts which might just as easily conclude that elective tonsilectomies and appendectomies must be included in hospital services if statistics show that such in hospital surgery reduces subsequent medical risk. Application of a standard which would prevent public hospitals from excluding alternative activities incident to the exercise of private rights through "practice and procedure" as the court below held, would seriously impede the right of governmental bodies to determine what *public* interests they would serve through such institutions and would place necessary discretionary power out of the hands of executive and legislative authorities.

Moreover, as this Court recognized in *Roe,* 410 U.S. at 160, there is a variety of ethical, moral and religious attitudes toward abortion. The personal, sensitive nature of familial, marital and reproductive decisions is in fact the very reason why the Constitution protects them as *private* fundamental rights, as opposed to rights necessarily exercised in "public" or through governmental instrumentalities, e.g., the right to interstate travel, *Shapiro* v. *Thompson,* 394 U.S. 618 (1969); the right to vote, *Terry* v. *Adams,* 345 U.S. 461 (1953).

Implicit in the recognition of 'zones' or penumbras of privacy is an understanding of the distinction between law, which dominates public activity, and personal morality which ought to determine private decisions and activities. What may be sufficient at law would not always be so according to private moral or religious standards. Yet to allow that a woman may demand that a public hospital, at public expense, implement her private decision to abort, made without reference to what public interests her decision would in fact serve, would entangle the city in the

facilitation of her purely ethical decisions. Given the differences among members of the public on the moral content of an abortional act, the city has an obvious interest in avoiding the imposition upon the public at large of the obligation to implement purely elective or non-medically indicated abortion and the entanglement of public policy in personal and private moral decisions which such a policy would entail.

If the abortion decision is so private in the first trimester as to preclude any governmental regulation or restriction beyond requiring it be performed by a licensed physician, it follows that government should not itself be compelled to respond to the demand of the exercise of that private right, unless this Court in *Roe* v. *Wade* intended to institute an affirmative right to an abortion—abortion on demand—of the woman alone unsupported by valid medical indications. Clearly, this Honorable Court did not intend to create an affirmative right to abort but rather intended to acknowledge a right to privacy which includes the abortion decision. It is a private and personal right which in no way mandates public support or public funding. The fact that a woman has a right to abort does not create a correlative right to have that abortion publicly financed. Yet the appellee here demands that the city finance, facilitate and supply a compliant physician and its hospital to implement her private decision. She demands, in other words, the city foster what it cannot in any way restrict or require. We cannot believe the Constitution requires this result.

The appellee would have this Court hold, through strict application of the Equal Protection Clause, that the city may not constitutionally distinguish medically and non-medically indicated abortion. Such a decision would baldly contradict this Honorable Court's readings in *Roe* and

Doe where the distinction between compelling and non-compelling state interests at stake in the various stages of pregnancy formed the very basis of the woman's right to abort in the first trimester free from state restriction or regulation. If that distinction serves to exclude state criminal sanctions upon the abortion decision and its effectuation, it should logically serve to permit governmental bodies to exclude non-medically indicated abortion services from their social and economic programs as well.

In addition, appellee misconstrues the classification at issue in this case. The distinction made by the city of St. Louis is not between abortion and childbirth, as appellee argues, but rather between medically indicated abortions and abortions which are not medically indicated. The classification does not divide the groups into those who desire childbirth and those who desire abortions but rather between those who need medically indicated abortions (which St. Louis provides) and those who do not. Properly seen in this manner, the classification is neither suspect nor unconstitutional.

Upon the principles of equal protection the appellee presently urges upon this Court, if parents were for some reason incapable of effectuating their private fundamental right to educate their children in a particular foreign language, *Meyer* v. *Nebraska,* 262 U.S. 390, 399 (1923), the state would apparently be required by the Constitution to finance and facilitate that decision if it provided education in foreign languages through its public schools at all. We doubt that this Court would subject public schools to such private parental decisions made without reference to the availability of scarce resources, much less to what public interests public schools in fact propose to serve. Neither should public hospitals be required under the Constitution to provide for every alternative incident to the exercise of private rights. It is clearly the prerogative of public governmental bodies to decide what public interests its programs should serve, limited only where its policies are patently irrational or unrelated to its valid interests.

Again, under principals urged by the appellee, would this Court hold that the private fundamental right to possess and peruse obscene literature, *Stanley* v. *Georgia,* 394 U.S. 557, 564 (1969), requires public libraries which exclude pornography, as they commonly do, to then purchase it, supply shelf space and even employ staff "experts" in the field with no moral and religious objections to it, in order to implement the exercise of this private fundamental right? We think not. In fact this Court has found that obscene literature may be properly excluded from the mails, *U.S.* v. *Reidel,* 402 U.S. 351 (1971), excluded in places of public accommodation, *Paris Adult Theater* v. *Slaton,* 413 U.S. 49 (1973), and excluded from intra-state commerce even if transported in a private vehicle and to be employed for private purposes, *U.S.* v. *Orito,* 413 U.S. 139 (1973); *Cf. U.S.* v. *12 200-ft. Reels,* 413 U.S. 123 (1973). This is so because obscenity, like the abortional act, enjoys no constitutional protection *in itself.* Rather, the Constitution protects a zone within which activity may be effectuated without state interference. In *Stanley,* that zone was decided to include the home; in *Roe,* the woman in consultation with her physician—not the woman alone demanding of her physician.

A "right of privacy" necessarily denotes a barrier or wall of separation between public and private domains where, on one side, the public interest expressed in social and economic policy is determinative and, upon the other, private, ethical interests are dominant. Private desire and public will may at times intersect. But what the appellee

demands is a "one-way" street where her private interest in an abortion expressed in the public domain will be satisfied without reference to extant public policy rationally related to public interests. The burden should be upon the appellee to show that her interests and those of the public expressed gratuitously through its public hospitals coincide, not upon the hospitals to show they do not.

If, indeed, the city maintained a monopoly upon abortional services—analogous to marriage and divorce, *Bodie* v. *Connecticut,* 401 U.S. 371 (1971); or the judicial process, *Griffin* v. *Illinois,* 351 U.S. 12 (1956)—the appellee might justly claim that the exercise of her private right had been in fact "infringed" by a denial of equal protection on account of her indigency were no non-therepeutic abortions then provided. But the city has formed no monopoly upon medical, much less abortional, services and would be presumably forbidden by the Constitution to do so. Since this Court has never held that citizens have an independent right under the Constitution to public welfare, in the form of medical care or not, the argument that the appellee presents that the public must supply her with an elective abortion because she cannot afford one or deny her equal protection clearly fails. The logic the appellee follows would oblige governmental entities to indulge desires, even whims of indigent clients without reference to its own valid interests. In his lecture "A Constitutional Faith," published in 1968, Justice Hugo Black stated, "Nor does a grant to the people of the right to assemble to speak or to write carry any inference that the government must provide streets, buildings, or places to do the speaking, writing or assembling." (Page 58).

The disparate treatment afforded at the city's hospitals of non-medically indicated abortions does not constitute invidious discrimination, nor is it patently arbitrary. It

reflects a discretionary allocation of scarce medical resources to satisfy the purpose public hospitals are instituted to serve: necessary medical treatment. Public hospitals are not "forums" for the exercise of private rights, but public institutions meant to serve public interests. It follows that a woman who has made an independent decision to abort ought to demonstrate medical need, as all patients must, before the resources of the hospital are put at her disposal.

Although the pregnant woman may make *her* decision on the basis of non-medical criterion or the "detriments" which accrue to pregnancy, 410 U.S. at 153, physicians are to exercise their "medical judgment," as their training equips them to do. The appellee argues in substance that the physicians medical judgment must *ipso facto* conform to the private interests, whether specifically medical or not, upon which a woman desiring an abortion bases her decision. If, in other words, she reaches her decision to abort, some person or agency somewhere then is obliged to conform their judgment to her own. Since she claims indigency, then the city, through its hospital and its agents, must conform. This, we assert, is not only absurd but would constitute abortion on demand. The appellee has no more "right" to demand the city conform to her interests and supply her with a public abortionist than a wealthy patient could coerce any private physician to conform his conscience or judgment to her own. The policy of the city hospitals asks that physicians in its employment in fact exercise *medical* judgment before its facilities be employed for abortion which this Court has in any case presumed they would in fact do.

The Court below notes that no abortions had been performed at the city hospitals since January 1973 to the date of the opinion. This should surprise no one. It merely reflects the fact that abortion is not that often medically in-

dicated. In addition, hospitals are not the usual forum for first trimester abortions when the vast majority are performed in clinics. The city rightfully allocates its scarce medical resources to meet only genuine medical needs. This Court should not compel otherwise. Nor should this Court compel any public hospital to hire technicians to perform non-medically indicated abortions on demand.

Further, as before noted, the city has an interest in preventing the entanglement of public policy and monies in purely private decisions of a sensitive ethical or moral nature. Where no medical indication exists to warrant abortion, the city should not be compelled to facilitate through its medical facilities decisions opposed to its valid and important interests.

CONCLUSION

The application of the traditional test of Equal Protection, clearly appropriate in this case, demonstrates that the Equal Protection Clause of the United States Constitution does not require abortion on demand nor does it require public hospitals to perform abortions which are not medically indicated. Thus the policy of the City of St. Louis challenged in this case must be upheld as rationally related to the valid interests involved.

Respectfully submitted,

DENNIS J. HORAN
PATRICK A. TRUEMAN
DOLORES V. HORAN
JOHN D. GORBY
VICTOR G. ROSENBLUM
Attorneys for Americans United for Life, Inc.

Law student Thomas J. Marzen assisted in the preparation of this Brief.

STATE OF ILLINOIS)
) ss.
CITY OF CHICAGO)

CERTIFICATE OF SERVICE

I, Victor Rosenblum, one of the attorneys for Amici Curiae, being a member of the Bar of the Supreme Court of the United States, due hereby certify I have caused a true and correct copy of the foregoing motion, to be served upon Petitioners and Respondents they being all the parties of record by depositing such motion in a United States Post Office mailbox, with first-class postage prepaid addressed to Frank Susman, Esq., at his office of record, Pierre Laclede Center, 7733 Forsyth Blvd., Suite 1100, St. Louis County, Missouri 63105, Attorney for Respondents; Jack L. Koehr, City Counselor of the City of St. Louis, State of Missouri, and Eugene P. Freeman, Deputy City Counselor of the City of St. Louis, State of Missouri, Room 314, City Hall, 1200 Market Street, St. Louis, Missouri 63103, Attorneys for Petitioners, this 20th day of August, 1976.

.....

Victor G. Rosenblum

MOTION FILED

SEP 20 1975

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 75-442

JOHN H. POELKER, Mayor of the City of St. Louis, Missouri, and R. DEAN WOCHNER, M.D., Director of the Department of Health and Hospitals and Acting Hospital Commissioner of the City of St. Louis, Missouri,
Petitioners,

vs.

JANE DOE, AND A CLASS,
Respondents.

MOTION OF MISSOURI DOCTORS FOR LIFE FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JEROME M. McLAUGHLIN
1930 Boatmen's Bank Building
St. Louis, Missouri 63102
(314) 241-5230
Attorney for Amicus Curiae

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

TABLE OF CONTENTS

Page

Motion of Missouri Doctors for Life for leave to file a Brief as amicus curiae in support of petitioner's petition for a writ of certiorari 1

Brief amicus curiae of Missouri Doctors for Life in support of petitioner's petition for a writ of certiorari 3

Statement of the Case 3

Argument 6

Conclusion 14

TABLE OF AUTHORITIES CITED

Cases

Roe v. Wade, 410 U. S. 113 (1973) 4, 6, 12, 13, 14

Doe v. Bolton, 410 U. S. 179 (1973) 4, 6, 12, 13, 14

Doe v. Hale, 500 F. (2) 144 (1974) 11

Constitutional Provisions

First Amendment to the Constitution of the United States . 8

Article I Section 5 Constitution of the State of Missouri, 1945 8

Statutes

United States Code Title 42, Sec. 300 a 7 9

Missouri Revised Statutes Section 197.032 (Supp. 1975) .. 8

St. Louis City Charter Provisions

Charter provisions of the City of St. Louis Article XVIII, Civil Service Section 3, Section 16, Section 22 11

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. .....

JOHN H. POELKER, Mayor of the City of St. Louis, Missouri, and R. DEAN WOCHNER, M.D., Director of the Department of Health and Hospitals and Acting Hospital Commissioner of the City of St. Louis, Missouri,
Petitioners,

vs.

JANE DOE, AND A CLASS,
Respondents.

MOTION OF MISSOURI DOCTORS FOR LIFE FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Missouri Doctors for Life, a Not-for-Profit Corporation, respectfully moves for Leave to File a Brief as Amicus Curiae in Support of the Petitioners' Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit in the within cause.

Missouri Doctors for Life is a Not-for-Profit Corporation, incorporated under the laws of the State of Missouri for the express purpose of providing a framework for systematic and continuous research and the education of physicians, other medical personnel, scientists, scholars and the public at large, concerning the biological and ethical facts of embryonic and fetal development, the meaning of sexuality and parenthood and the respect for life in all of its aspects.

Its membership includes over 375 practicing and teaching physicians in the City and County of St. Louis and one or more of its members can be found on the staff of almost every hospital in the community, including the general public hospitals operated by the City of St. Louis.

The physician members of Missouri Doctors for Life have a special interest in the litigation now before this Court because their right to practice medicine according to their best professional judgment and the dictates of their personal and individual consciences as well as the staffing practices and procedures of the St. Louis City Hospitals is under attack. We are frankly concerned that our rights as practicing physicians which are guaranteed under the Federal and State constitutions and specifically under Missouri State and Federal statutes are in jeopardy and for this reason we ask leave of this Court to present our views regarding the underlying principles upon which the dispute involved in this lawsuit should be determined.

The consent of Eugene P. Freeman, counsel for Petitioners, has been obtained and has been filed with this Court. The consent of Frank Susman, counsel for Respondent, has been requested and such consent was not granted.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. .....

JOHN H. POELKER, Mayor of the City of St. Louis, Missouri, and R. DEAN WOCHNER, M.D., Director of the Department of Health and Hospitals and Acting Hospital Commissioner of the City of St. Louis, Missouri,
Petitioners,

vs.

JANE DOE, AND A CLASS,
Respondents.

BRIEF AMICUS CURIAE OF MISSOURI DOCTORS FOR LIFE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

STATEMENT OF THE CASE

The plaintiff's complaint filed in the District Court sought a declaratory judgment holding certain alleged rules, regulations and practices of the General Public Hospitals of the City of St. Louis prohibiting the performance of abortion to be

violative of the Constitutional rights of the anonymous plaintiff and requested the Court to issue a permanent injunction restraining the defendants from implementing or enforcing said rules and regulations.

The evidence adduced in the trial of this case reflected that plaintiff Doe, with a history of 5 miscarriages since 1965, presented herself in August of 1973 for an examination at the St. Louis City Hospital to determine if she was pregnant. Laboratory tests confirmed that she was pregnant and she requested that an abortion be performed. All of the medical witnesses testified that they found no medical reason to indicate an abortion and that they knew of no one on the hospital staff who would perform an abortion on the plaintiff.

The District Court entered a memorandum and order denying the relief sought by plaintiff and dismissing her complaint.

On appeal the United States Court of Appeals for the Eighth Circuit held the City's policy prohibiting all non-therapeutic abortions in its publicly owned hospitals to be unconstitutional as an unwarranted infringement on the pregnant woman's right to privacy, and as a denial of equal protection to indigent pregnant women.

The Appellate Court also held the method of staffing the obstetrics-gynecology clinic of the city hospitals to be an unconstitutional denial of equal protection to those indigent pregnant women who, in exercising their right to privacy, may choose to terminate the pregnancy under the guidelines laid down in *Roe v. Wade* and *Doe v. Bolton*.

It was the judgment of the Appellate Court that the City owned hospital facilities be made available for abortion services and the District Court was directed to issue an injunction enjoining the enforcement of the City's anti-abortion policy and imposing upon the City the duty to obtain the services of

physicians and other necessary personnel whose personal views do not prohibit them from providing an abortion. The City was also directed to provide the necessary equipment and facilities for the performance of abortions in its public hospitals.

There were a number of amendments and modifications made by the Appellate Court and a timely petition for a writ of certiorari was filed by Petitioners Poelker and Wochner.

ARGUMENT

I

The Decision of the Appellate Court Is an Unconstitutional Infringement on the Rights of Physicians and Other Medical Personnel to Practice Medicine According to Their Best Professional Judgment and in Accord With the Dictates of Their Individual Consciences.

While the members of this organization are in fundamental disagreement with the holdings of this Court in *Roe v. Wade* and *Doe v. Bolton*, it is not our purpose to reargue those cases. We do, however, wish to call to this Court's attention how the Circuit Court of Appeals, ostensibly acting under the authority of *Roe* and *Doe* has fashioned a new and incredible judicial theory which is at variance with the majority opinion in those cases.

On four separate occasions in the majority opinion in *Roe v. Wade*, Justice Blackmun was careful to limit abortions only to those instances in which the medical judgment of the patient's treating physician dictated that the pregnancy should be terminated. He concluded that "the abortion decision in all its aspects is inherently and primarily a medical decision and *basic responsibility for it must rest with the physician.*" *Roe v. Wade*, 410 U.S. 113.

It is abundantly clear that under the Blackmun opinion a physician is free to prescribe and perform abortions only in those situations in which his best medical judgment dictates that the pregnancy should be terminated. Nowhere does the majority opinion hold or even infer that abortions can be performed for social, economic or other reasons.

The Chief Justice in the final paragraph of his concurring opinion in *Roe v. Wade* tried to allay the concern of the dissenting Justices (White and Rehnquist) in setting forth his

interpretation of the majority opinion. Justice Berger said "I do not read the Court's holding today as having the sweeping consequences attributed to them by the dissenting Justices; the dissenting views discount the reality that the vast majority of physicians observe the standards of their profession and act only on the basis of carefully deliberated medical judgments relating to life and health. *Plainly, the Court rejects any claim that the constitution requires abortion on demand.*"

Unfortunately, the views of the dissenting Justices were all too prophetic. In direct violation of the guidelines laid down in the majority opinion and the concurring opinion of the Chief Justice, many of the Federal Court decisions have made "abortion on demand" a constitutionally guaranteed right.

The opinion and judgment of the Court of Appeals directs the District Court to fashion "prompt and appropriate injunctive relief." Continuing, the Court decreed that "In addition to enjoining enforcement of the City's anti-abortion hospital policy, this relief should, at a minimum, impose upon the City the duty to obtain the services of responsible physicians and other necessary personnel whose personal views on abortion do not prohibit them from providing an abortion." (*Doe v. Poelker*, — F(2) —, 8th Circuit No. 75-1069).

Since all of the doctors on the staffs of the two City Hospitals hold personal views on abortion which prohibit the performance of this procedure, it logically follows that the Court's order requires at least one or more of said doctors to be replaced. In short, the Court's order necessarily requires the City of St. Louis to discriminate against those doctors who hold personal convictions against abortion with respect to the employment of physicians and the staffing of its public hospitals.

While it is true that the Court opinion directs that no present member of the staff of the public hospital be required to participate in an abortion against the dictates of his conscience, one or more physicians who hold personal views against abor-

tion will have to be replaced on the staff or will not stand on an equal footing with a physician who does not oppose abortion in the competition for any future staff position which may become available at the City's public hospitals.

The opinion, while paying lip service to the constitutional and statutory rights of many physicians in the St. Louis Metropolitan community who hold professional and moral views against abortion, actually and effectively denies such physicians their constitutional rights and renders the so-called "conscience clause" a nullity. The Court cannot escape the discriminatory consequences of its judgment by directing the injunction against the city officials. The discrimination is just as real and just as invidious, and the root cause of the discrimination is the edict of the Circuit Court. The obvious and logical effect of the opinion as it is applied to physicians opposed to abortion is unlawfully and unconstitutionally discriminatory.

The physician's right not to become involved in the abortion procedure is specifically guaranteed by the first amendment to the United States Constitution and by Section 5 of Article I of the Constitution of the State of Missouri which provides:

> "That all men have a natural and indefeasible right to worship almighty God according to the dictates of their own consciences; that no human authority can control or interfere with the right of conscience; that no person shall, on account of his religious persuasion or belief, be rendered ineligible to any public office or trust or profit in this state, be disqualified from testifying or serving as a juror, or be molested in his person or estate; * * *"

Section 197.032 Revised Statutes of Missouri (1973) provides:

> 1. No physician or surgeon, registered nurse, practical nurse, midwife or hospital, public or private, shall be required to treat or admit for treatment any woman for the

> purpose of abortion if such treatment or admission for treatment is contrary to the established policy of, or the moral, ethical or religious beliefs of, such physician, surgeon, registered nurse, midwife, practical nurse or hospital. No cause of action shall accrue against any such physician, surgeon, registered nurse, midwife, practical nurse or hospital on account of such refusal to treat or admit for treatment any woman for abortion purposes.
>
> 2. No person or institution shall be denied or discriminated against in the reception of any public benefit, assistance or privilege whatsoever or in any employment, public or private, on the grounds that they refuse to undergo an abortion, to advise, consent to, assist in or perform an abortion.
>
> 3. Any person who shall deny or discriminate against another for refusal to perform or participate in an abortion shall be liable to the party injured in an action at law, suit in equity or other redress."

42 U.S.C.A. Section 300a-7 provides as follows:

> "(a) The receipt of any grant, contract, loan, or loan guarantee under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Services and Facilities Construction Act by any individual or entity does not authorize any court or any public official or other public authority to require
>
> (1) such individual to perform or assist in the performance of any sterilization procedure or abortion if his performance or assistance in the performance of such procedure or abortion would be contrary to his religious beliefs or moral convictions; or
>
> (2) such entity to—
>
> (A) make its facilities available for the performance of any sterilization procedure or abor-

tion if the performance of such procedure or abortion in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions, or

(B) provide any personnel for the performance or assistance in the performance of any sterilization procedure or abortion if the performance or assistance in the performance of such procedure or abortion by such personnel would be contrary to the religious beliefs or moral convictions of such personnel.

(b)(1) No entity which receives a grant, contract, loan or loan guarantee under the Public Health Service Act, the Community Mental Centers Act, or the Development Disabilities Services and Facilities Construction Act after June 18, 1974, may—

(A) *discriminate in the employment, promotion, or termination of employment of any physician or other health care personnel,* or

(B) discriminate in the extension of staff or other privileges to any physician or other health care personnel,

because he performed or assisted in the performance of a lawful sterilization procedure or abortion, *because he refused to perform or assist in the performance of such a procedure or abortion on the grounds that his performance or assistance in the performance of the procedure or abortion would be contrary to his religious beliefs or moral convictions,* or because of his religious beliefs or moral convictions respecting sterilization procedures or abortions."

Concomitant to the physician's right of conscience in this matter is the guarantee that he will not be discriminated against in his employment by reason of his beliefs and practices with

respect to abortion. In addition to the aforementioned constitutional and statutory guarantees, the charter of the City of St. Louis provides as follows:

Article XVIII, Civil Service:

"*Sec. 3,* (n) *Removals and demotions.*—For removals, demotions and decreases in pay in the cases of employes whose service rendered in below satisfactory standards, designed to promote the efficiency of the service. Such action shall be effective only after written notice to, with right of appeal in, the employes affected, and after such investigation as is appropriate to insure that the action taken is on the sole ground of merit and fitness.

Sec. 16, Racial, political and religious discrimination.—No recommendation or question under the authority of this article shall relate to the race, political or religious opinions, affiliations or service of any person. No person shall be appointed to a position in the classified service hereunder, nor be demoted, re-employed, promoted, removed, increased or reduced in compensation, nor in any other way be favored or discriminated against in any matter within the purview of this article, because of his race, political or religious opinions, affiliations or service."

The physician's right in this matter has been specifically recognized by a First Circuit in the case of *Doe v. Hale,* 500 Fed. 2d 144, 147, where the following quotation is found:

"Nor does this order require that any individual member of the staff of Hale Hospital or any employee of Hale Hospital participate or assist in any way in the performance of abortions if that person as a matter of conscience objects to so doing."

It goes without saying that if a physician or other medical assistant can be denied employment on the basis of his moral convictions regarding abortion, the aforementioned rights guar-

anteed specifically under the Constitution and the law have been violated. Surely the pregnant women's right of privacy with respect to the abortion decision is not superior to the physicians right to practice medicine according to his best professional judgment and the dictates of his conscience and his further right not to be discriminated against with respect to his employment on account of his moral beliefs.

II

The Opinion of the Court of Appeals Is Contrary to and Misinterprets the Holding of This Court in Roe v. Wade and Doe v. Bolton.

The record in the instant case is totally devoid of any evidence which indicates that there was any medical reason for the termination of plaintiff Doe's pregnancy. Quite to the contrary, each medical witness who testified in the case stated that on the basis of his examination no medical condition could be found which indicated that the pregnancy should be terminated.

In *Roe v. Wade*, 410 U.S. 113 and *Doe v. Bolton*, 410 U.S. 179 this Court held that "the abortion decision in all its aspects is inherently and primarily a medical decision and basic responsibility for it must rest wth the physcian." In the instant case, the abortion decision was made by the woman without the consultation of any physician. The several staff physicians who examined Respondent Doe testified that in their professional judgment there was no medical reason to terminate her pregnancy.

The staffing procedures at the St. Louis City Hospitals which are condemned by the Court of Appeals were in effect long before the *Doe* and *Roe* decisions. These procedures were not put into effect to circumvent the rights of indigent women in respect to the abortion decision, but the Court of Appeals now finds these procedures to be unconstitutional.

As a practical matter a pregnant woman who seeks treatment at one of the City hospitals in St. Louis is referred to one of the physicians on the staff. The Court of Appeals is now saying that the City hospitals must staff their facilities so that one or more physicians on the staff is not morally opposed to non-therapeutic abortions. A woman seeking an abortion should then, we suppose, be referred to that particular physician. But such a procedure is not in accord with the teachings of *Roe* and *Doe* which expressly denies that the constitution requires abortion on demand and holds that the abortion decision is a medical decision to be made by the physician. In the instant case, the abortion decision was made by the woman and the Court of Appeals is now telling the City hospital that it must find a physician who agrees with the woman's decision and who will effectuate the termination of her pregnancy.

Unfortunately many of the Federal Court decisions on this issue have disregarded the clear and unequivocal pronouncements in *Roe* and *Doe* and have expanded those decisions from a prohibition against state interference in the abortion decision to a positive requirement that public hospitals provide doctors and facilities for the termination of pregnancies of women who appear and demand the abortion service.

Nowhere in *Roe* and *Doe* do we find any support for the thesis that abortions must be performed for women who choose to terminate their pregnancy for social or economic reasons. And yet the Court of Appeals in this case has ordered the City hospitals of St. Louis to change their staffing procedures and to specifically hire physicians and other personnel willing to perform abortions on the basis of a request made by a woman who provided no evidence that there was any medical reason or justification for the termination of her pregnancy.

We respectfully submit that such a holding is contrary to the pronouncements of this Court in *Roe* and *Doe* and should not be permitted to stand.

CONCLUSION

Because very fundamental rights of physicians and other medical personnel have been disregarded by the Appellate Court in its headlong rush to provide abortion services to indigent women, we earnestly request the Court to issue a writ of certiorari as prayed for by Petitioners and review the opinion and judgment of the Eighth Circuit. We are certain that this Court will find that the opinion of the Circuit Court is not a logical extension of *Roe* and *Doe* but an obvious perversion of the teaching of those cases.

Until very recently, the performance of a non-therapeutic abortion in the State of Missouri was a felony. In a little over two years time the Courts have elevated "abortion on demand" to the status of a constitutionally guaranteed right in direct defiance of the holdings of this Court. The rights of physicians and other medical personnel have been totally ignored or given little consideration.

We honestly feel that when an Appellate Court on the basis of the record in this case can order a public hospital to dramatically change its long established staffing procedures and make consent to perform abortions a condition of employment, it is absolutely essential for this Court to review and correct such a decision taking into account the constitutional rights of all parties concerned.

Respectfully submitted

JEROME M. McLAUGHLIN
1930 Boatmen's Bank Building
St. Louis, Missouri 63102
(314) 241-5230
Attorney for Amicus Curiae

Supreme Court, U. S.
FILED
SEP 22 1975
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-442

HONORABLE JOHN H. POELKER, Mayor of the
City of St. Louis, et al.,
Petitioners,

vs.

JANE DOE, et al.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals
for the Eighth Circuit

MOTION

For Leave to File a Brief Amici Curiae on Behalf of the Following Individuals, The Honorable James R. Butler, Councilman, Second District, a Political Subdivision of St. Louis County and the State of Missouri; Alan J. Bailey, M.S.W.; Ann O'Donnell, R.N., Chairman of the Eastern Region of Missouri Citizens for Life; Edward A. O'Donnell; William Murphy, M.S.W.; Dr. William Brennan, M.S.W., Ph.D.; George Ryan, M.S.W., A.C.S.W.; Edward Ratermann; Dr. George W. Knight, III; Robert E. Ratermann, Pro Se, Member of Lawyers for Life; Theodore J. Petersen; Joseph J. Heithaus III; Eleanor Heithaus; James D. Schonhorst; Dorothy Schonhorst; Ronald Merideth; Mary Jeanne Merideth; Barbara O'Mara; Nancy J. Dougherty; Kathy Begley; and Judith A. Cassilly and Organization, Social Workers for Life; in Support of Petitioners.

ROBERT E. RATERMANN
11232 Bellefontaine Road
St. Louis, Missouri 63138
Attorney for Moving-Parties

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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Come now, Movants for leave to file a Brief Amici Curiae, the Honorable James R. Butler, Councilman, Second District, a Political Subdivision of St. Louis County and State of Missouri, certain named individuals (hereafter referred to as Moving-parties), all specifically as indicated in the preceding caption, and respectfully *Move For Leave to File A Brief Amici Curiae* in the above cause before this Court in that while Petitioners, the Honorable John H. Poelker, Mayor of the City of St.

Louis, Missouri, et al., have through counsel given consent thereto, Respondents, Jane Doe, et al., though requested to give their consent through their counselors, have not to date done so, and as grounds therefore state and advise as follows To Wit:

1. The opinion-judgment of April 14, 1975 as modified May 7, 1975 and June 2, 1975, the denial of the request of Petitioners for rehearing June 24, 1975 by the United States Court of Appeals for the Eighth Circuit in causes Numbered 74-1232 and 75-1069, the denial of their motion for stay of the mandate of the Court below pending application for Certiorari to this Court July 7, 1975, the mandate on July 8, 1975, the denial August 5, 1975 by the Honorable Harry A. Blackmun, Associate Justice, Circuit Justice for the Eighth Circuit, of Movants' (Petitioners herein) motion for stay of judgment and execution pending application to this Court for Certiorari to the United States Court of Appeals for the Eighth Circuit, the orders, judgment, decree and opinion of the United States District Court for the Eastern District of Missouri, Eastern Division, issued, Friday, August 8, 1975, the denial of Movants' (Petitioners herein) second motion for stay (similar to that directed to the Honorable Harry A. Blackmun) by the Honorable Lewis E. Powell, Jr., Associate Justice, August 26, 1975, *raises issues constitutional in nature at variance with and contrary to the First, Fifth, Ninth, Tenth and Fourteenth Amendments of the United States Constitution, and contrary to this Court's decisions in Roe v. Wade, 410 U.S. 113, and Doe v. Bolton, 410 U.S. 179 (1973)*; such issues are of the utmost gravity politically for the people of the United States of America presently and for the future if allowed to stand.

2. This is further so, for the reason that at the very minimum and specifically, this Court's decisions in *Roe v. Wade and Doe v. Bolton, supra,* are given by the Court below as the seminal precedent (see pages 13 through 16 of amended opinion of June 2, 1975 as per copy certified by the Clerk of the United States

Court of Appeals for the Eighth Circuit) for its opinion-judgment, decree, mandate and orders *stated in terms declaratory* but in intent and fashioning by any fair construction thereof *injunctive with respect to Petitioners.* These go far beyond said decisions of this Court, with consequences, we repeat of the utmost gravity politically for the people of the United States of America and for people and nations all over the world.

3. Because we do not believe that anywhere in the *Roe v. Wade and Doe v. Bolton, supra,* decisions, is there express authority for the requirement that publicly-financed hospitals must provide abortions on demand or non-therapeutic abortions (though such hospitals regularly perform therapeutic abortions for reasons of health immediately related to the threatened physical death of the mother), this Court should grant the Writ of Certiorari and the leave sought herein and thereby permit Moving-parties to elucidate this point in their brief as Amici Curiae.

4. The decision of the United States Court of Appeals for the Eighth Circuit in these causes and their inevitable nexus with the decisions of this Court in *Roe v. Wade* and *Doe v. Bolton, supra,* conflict in a grave way with our nation's aspirations in human relationships, particularly its time-honored fostering of the dignity and the sanctity of human life, the human individual and the human person within its borders and abroad. This is what the American Revolution, the Bill of Rights with addition of the Fourteenth Amendment and the Civil War are all about.

5. These decisions it is respectfully submitted, comport tragically with the Declarations on Human Rights of the United Nations and with the political traditions upon which our forebears founded, fashioned and molded these United States of America in their conception and growth to this very day.

6. The mandate of the United States Court of Appeals for the Eighth Circuit handed down July 8, 1975 is an unwarranted extension of this Court's decision in *Roe v. Wade* and *Doe v. Bolton, supra.*

The Eighth Circuit Court has, however, relied on this Court's opinions in the *Roe v. Wade* and *Doe v. Bolton, supra,* cases of 1973 for this extension, and therefore this Court should review the dangerous social and political consequences of its own opinions in these cases.

The course chosen by this Court in *Roe v. Wade* and *Doe v. Bolton, supra,* has charted a course of national suicide thereby, and without any precedent therefore, has used the Constitution and its Bill of Rights as added to by the Fourteenth Amendment as an engine of oppression against totally defenseless unborn children, whether or not these children can be proven to possess the full actualization of human life at some point of gestation. Modern genetics, embryology and other related science specialties testify to an ever-increasing knowledge of human life in its scientific origins and detailed components. These sciences which spell out the marvelous intricacy with which human life is conceived and implanted within a mother's womb, heighten man's moral responsibility to respect it, and the choice made by a male and female in procreating it. They are by their freely-chosen act made participants privy to their Creator's gift of new life as they themselves once were so generated by their parents in their mother's womb. So stating the event characterizes all that is best and ideal in the history of civilizations; this is what produced a Hippocrates and the Ephesian, Soranos in Greco-Roman antiquity, and the Scriptures from Genesis through Revelation reiterate on every page the reverence due human life. Christianity itself, contrary to the summations indicated in text and footnotes of the *Roe v. Wade* and *Doe v. Bolton, supra,* opinions, throughout its history documents a profound reverence for human life and imposes sanctions for its violation in stern terms (see the tracing of this history, *only as an example,* in the recent publication *Declaration on Abortion,* Sacred Congregation for the Doctrine of the Faith given November 18, 1974, Publication Office of the United States Catholic Conference, 1975, with notes pages 12, 13 and following).

Our political origins rooted as they are in the traditions of Western Civilization brought to these shores by the early settlers and immigrants from many European countries are recorded and remembered in our books, our schools, our churches, our synagogues, our homes and our shrines and were engraved in the hearts and minds of our founding fathers, among whom Thomas Jefferson stands out and who, out of gratitude, is memorialized on the nearby banks of the Potomac in the noble monument erected to the memory of this magnificent person and in which in the great dome are chiseled in stone and emblazened in letters of gold a tribute to this thought in his words, "I have sworn upon the altar of God eternal hostility against every form of tyranny over the mind of man." This honored Court has often in its decisions given life to the spirit of such men who fashioned our Constitution, our Bill of Rights, our Fourteenth Amendment, and we ask the question why it is not reasonable and proper to view them from their historical setting as applicable to the unborn child, to nascent human individual life intended by the Creator for the full protection accorded a defenseless person. This is our medical history. (See No. 75-174, in the Supreme Court of the United States, October term, 1975, Alan Ernest, Guardian for Unborn Children and pro se, Petitioner v. Andrew P. Miller, Attorney General of Virginia, Petition for a Writ of Certiorari to the Supreme Court of Virginia.) This is also our political, scientific, philosophical, Scriptural, religious and theological history. This is the history of God's chosen people to which we are all called.

Respectfully submitted,

ROBERT E. RATERMANN
Attorney for Moving-Parties
11232 Bellefontaine Road
St. Louis, Missouri 63138

STATE OF MISSOURI }
CITY OF ST. LOUIS } ss.

Certificate of Service

I, Robert E. Ratermann, Attorney for Movants (herein referred to as Moving-parties, moving for leave to file an Amicus brief in support of Petitioners), being a member of the Bar of the Supreme Court of the United States, due hereby certify I have caused a true and correct copy of the foregoing motion, to be served upon Petitioners and Respondents they being all the parties of record by depositing such motion in a United States Post Office mailbox, with first-class postage prepaid addressed to Frank Susman, Esq., at his office of record, Pierre Laclede Center, 7733 Forsyth Blvd., Suite 1100, St. Louis County, Missouri 63105, Attorney for Respondents; Jack L. Koehr, City Counselor of the City of St. Louis, State of Missouri, and Eugene P. Freeman, Deputy City Counselor of the City of St. Louis, State of Missouri, Room 314, City Hall, 1200 Market Street, St. Louis, Missouri 63103, Attorneys for Petitioners, this 19th day of September, 1975.

Robert E. Ratermann
Attorney for Movants

Supreme Court, U. S.
FILED
AUG 20 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 75-442

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Petitioners,

vs.

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Respondents.

On Writ of Certiorari to the United States Court of Appeals
For the Eighth Circuit

BRIEF AMICI CURIAE

Of the Honorable James R. Butler, Councilman, Second District, a Political Subdivision of St. Louis County and the State of Missouri; Alan J. Bailey, M.S.W.; Ann O'Donnell, R.N., Chairman of the Eastern Region of Missouri Citizens for Life; Edward A. O'Donnell; William Murphy, M.S.W.; Dr. William Brennan, M.S.W., Ph.D.; George Ryan, M.S.W., A.C.S.W.; Edward Ratermann; Dr. George W. Knight, III; Robert E. Ratermann, Pro Se, Member of Lawyers for Life; Theodore J. Petersen; Joseph J. Heithaus III; Eleanor Heithaus; James D. Schonhorst; Dorothy Schonhorst; Ronald Merideth; Mary Jeanne Merideth; Barbara O'Mara; Nancy J. Dougherty; Kathy Begley; and Judith A. Cassilly and Organization, Social Workers for Life; in Support of Petitioners.

ROBERT E. RATERMANN
11232 Bellefontaine Road
St. Louis, Missouri 63138
Also:
3701 Lindell
St. Louis, Missouri 63108
Attorney for Amici

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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On Writ of Certiorari to the United States Court of Appeals
For the Eighth Circuit

CORRECTIONS (ERRATA) FOR BRIEF AMICI CURIAE

Of the Honorable James R. Butler, Councilman, Second District; a Political Subdivision of St. Louis County and the State of Missouri; Alan J. Bailey, M.S.W.; Ann O'Donnell, R.N., Chairman of the Eastern Region of Missouri Citizens for Life; Edward A. O'Donnell, William Murphy, M.S.W.; Dr. William Brennan, M.S.W., Ph.D.; George Ryan, M.S.W., A.C.S.W.; Edward Ratermann; Dr. George W. Knight, III; Robert E. Ratermann, Pro Se, Member of Lawyers for Life; Theodore J. Petersen; Joseph J. Heithaus, III; Eleanor Heithaus; James D. Schonhorst; Dorothy Schonhorst; Ronald Merideth; Mary Jeanne Merideth; Barbara O'Mara; Nancy J. Dougherty; Kathy Begley; and Judith A. Cassilly and Organization, Social Workers for Life; in Support of Petitioners.

INDEX

Page

Covering Letter of Counsel for Amici to the Clerk of the Court, Dated August 12, 1976, and Motion of Amici Curiae for "Enlargement," (extension of time) etc., to file Brief ..... iv-ix

Brief of Amici Curiae

Notes 1 and 2 1

Interest of Amici Curiae 4

Argument 6

I. Amici adopt Brief for the Petitioners with some special observations 6

II. The opinion-judgment of April 14, 1975 as modified May 7, 1975 and June 2, 1975, the denial of the request of Petitioners for rehearing June 24, 1975 by the United States Court of Appeals for the Eighth Circuit in causes Numbered 74-1232 and 74-1069, the mandate on July 8, 1975, and the orders, judgment, decree and opinion of the United States District Court for the Eastern District of Missouri, Eastern Division, issued Friday, August 8, 1975 are unconstitutional in every relevant aspect of the Constitution wherein the highest value is placed upon every human life, every human individual, every person classically embodied in the universal!, "the sanctity of life" 7

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Conclusion 24

Request of Amici for leave to participate in the oral presentation and argument when case is docketed to be heard 26

Motion for Leave to File Addendum to Brief and Appendix 26

Appendix:

A. Exhibit I from Commentary, Volume Sixty, December, 1975, p. 81, Non-Sectarian Committee for Life, Mount Vernon, New York A-1

B. Exhibit II from Commentary, Volume Sixty-two, Number One, July 1976, p. 67. (Commentary is published monthly by the American Jewish Committee, Editorial and Business Offices: 165 E. 56th Street, New York, N.Y. 10022) A-2

C. Exhibit III, Resolution Number 16, adopted May 22, 1975, Board of Aldermen of the City of St. Louis A-3

D. Exhibit IV, Comments on the Supreme Court decision re: citations from Catholic theologians, by Father Peter Damien Fehlner, O.F.M., Conv., S.T.D. A-5

E. Exhibit V, Resolution Number 2458, adopted July 17, 1975, by the County Council of the County of St. Louis, Missouri A-16

Table of Authorities Cited

Declaration of Independence

We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness: ¶ 2 12

[their] lives, [their] fortune, and [their] sacred honor. Last ¶ 12

Constitution

Amendments

I, Redress of Grievances 11

XIII and XIV .....13 and 14

First, Fourth, Fifth, Ninth and Fourteenth 15

Bill of Rights .....12 and 13

Article III, Section 2 6

Constitution .....12 and 13

Every Relevant Aspect of the Constitution .....7 and 9

Preamble to the Constitution 12

Cases

Cox v. Louisiana, 391 U.S. 536 (1965) 24

Doe v. Bolton, 410 U.S. 192 (1973) 9, 10, 11, 12, 25

Doe v. Poelker, 497 F. 2d 1063 (C.A. 8th, 1974) 9

Doe v. Poelker, 515 F. 2d 541 (C.A. 8th, 1975) .....7 and 9

Lemon v. Kurfzman, 411 U.S. 192 (1973) 24

Lochner v. New York, 198 U.S. 45 (1905) 14

Roe v. Wade, 410 U.S. 116 (1973) 9, 10, 11, 12, 15, 25

United States v. Vuitch, 402 U.S. 62 (1971) ..9, 10, 11, 12, 25

Statutes and Court Rules

28 U.S.C. Statutes Section 1253 15

Revised Code of the City of St. Louis (1960), Charter 145, f.n. 2 24

Federal Rules of Civil Procedure, 52(A) 6

Rules of the Supreme Court of the United States

50(4) iv

50(1) and 34(2) .....v, viii

50(1)(2) vi

50(1), (2), (3), (4) and (5) vii

34 and 50(1), (2), (3), (4) and (5) 2

Other Authorities

Abortion and Social Justice, Thomas W. Hilgers and Dennis Horan, Sheed and Ward, New York, 1972. (Ch. 1, pp. 3-5, The Early Biography of Everyman, Bart T. Heffernan, M.D.) 15-18

Black, a Constitutional Faith (1968) 60, f.n. 1 24

Brungs, Robert, S.J., Director of the Institute for Theological Encounter with Science and Technology, Letter of August 11, 1976 18-23

Clerk, U.S. Sup. Ct., Advice by Phone August 16, 1976.. 2

Clerk, U.S. Sup. Ct., Letter to Eugene P. Freeman, July 6, 1976 3

Commentary, Vol. Sixty, Dec., 1975, p. 81 ..... A-1

Commentary, Vol. Sixty-Two, No. 1, July 1976, p. 67.. A-2

Deuteronomy, Ch. 30, Verse 19 viii

Deuteronomy, Ch. 32, Verses 18-21 8

Memorandum (Sup. Ct., U.S.) to Counsel in Cases Granted Review on July 6, 1976 2

Nuremberg Trials, "Crimes Against Humanity," Dachau, Buchenwald, Auschwitz 12

Oral Arguments in the Supreme Court Abortion Decision, (Chapter II, Comments on the Supreme Court Decision Re: Citation from Catholic Theologians, by Father Peter Damien Fehlner, O.F.M., Conv., S.T.D.) Sanctity of Life Publications, Ltd., Vol. 1, June 22, 1976, First Edition, 11232 Bellefontaine Rd., St. Louis, Missouri 63138 .....A-5—A-15

Resolution No. 16 of the Board of Aldermen of the City of St. Louis, Adopted May 22, 1975 ..... A-3

Resolution No. 2458, leave of the County Council of St. Louis County, Missouri, adopted July 17, 1975 .....A-15

Responsorial Psalm, (Dt. 32), Pray Together, St. Francis Xavier (College-Church) Parish Community, St. Louis, Mo. 8

St. Paul: Eph 5:5; 1 C 6:9; Gal 5:19; Rom 1:18-32 11

Sacred Writers: Ex 21:22-25; Ps 139:13-16; Ps 51:5; Jer 1:4,5; Lk 1:24-56 (From: Abortion: How Does the Word of God Regard the Human Fetus?, Rev. Dr. George W. Knight, II, Th. D., The Presbyterian Guardian, September, 1971, pp. 100-102 11

Signers of the Declaration of Independence 12

The Creator 7, 11, 13, 14

The Father, Jesus Christ, and the Holy Spirit 14

Yahweh 14

Page	Line	Corrections to Text
iv	21	Change "of" to — or —.
v	14	Change "1975" to — 1976 —.
v	21	After "Missouri" insert —. —.
vi	29	Omit duplication of footnote: "Request for oral argument accompanies. . . . Rule 50(1). —.
vii	5	After "time" insert —. Rule 50(1). (2). (3). (4) and (5), —.
vii	9	Change "50(4)" to — 50(1). (2). (3). (4) and (5) —.
vii	11	After "50(1)," insert — (2). (3) —.
vii	12	After "(4)" delete "," and add — and (5). —.
vii	28	Change "4" to — 5 —.
vii	30	Change "6" to — 7 —.
viii	20	Delete: alleged as a brief additional ground —.
viii	21	After "Court" delete "." and add —. the belief that a Nation founded "Under God". takes such of His Words seriously on the question in this case. —.
viii	27	After "additional" delete — such —.
viii	29	After "34" delete "(2)" and after "34" insert — (1). (2). (3) . . . "as provided in Rule 50 . . .", (4) and (5); — and after "argument" insert — Rule 50(1) —.
2	20	After "Court" insert —. —. After "Request" insert — of him —.

Page	Line	Corrections to Text
2	21	After "letter" insert — (see: under date of August 12, 1976, at page iv herein) — and delete: to the motion addressed to him—.
2	26	After "Amici" insert —, —. After "34" insert — (actually Amici believed by their motion set out herein that they were proceeding also under Rule 50(1), (2), (3), (4) and (5)), —.
2	30	After "brief" insert —, —.
2	32	After "instructions" insert — (Memorandum Sup. Ct. U.S.) —.
3	3	Change "Counsel for Amici's" to — Counsel-for-Amici's —.
3	11	After "counsel" add —, —. After "counsel" delete — or —.
3	12	After "consideration" delete "." and insert —, (See: Motion-proper to this effect at page 26 herein). —.
3	13	After "2." delete sentence beginning "The Statement of Jurisdictional, etc.. . . ." and ending "writ of this Court." — and After "2." insert — The Statement of Jurisdictional Grounds, The Constitutional Provisions Involved, the Questions Presented and the Statement of the Case are omitted from this Amici Curiae brief, since they are amply stated in the Motions of Petitioners for Stay of Judgment and Execution of July 31, 1975 and August 20, 1975, Pending Application to this Court for Certiorari to the Court of Appeals for the Eighth Circuit and in the Petition for the Writ of Certiorari to The United States Court of Appeals for the Eighth Circuit, filed in this Court September 20, 1975 and granted by this Court July 6, 1976 and in the Brief of the Petitioners being filed August 20, 1976, pursuant to such writ of this Court. —.

3	26	Change "petitioners" to — Petitioners —.
4	8	After "member" insert —, —.
4	34	Omit "(See Appendix A-1 for more particulars on the interest of the above named Amici, and" —.
5	1	Change "other persons" to — Other Persons —.
5	2	After "hundred" insert —, — and change "including" to — include —.
5	7	Omit "(See for more particulars, Appendix F-1 and legend.) —.
6	10	After "Court" insert — they —.
6	11	After "one" insert — (—.
6	12	After "degree" insert —) —.
6	13	After "flagrantly" insert — violated —.
6	18	Change "is" to — [was] —.
6	19	After ". . . District Court" insert — (See: Petition for a Writ of Certiorari, page 4, question 3 by Petitioner; Also See: pages 11 and 15 of Petitioners' Brief, on Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit) —.
6	20	Omit "by the counsel" and change "U.S." to — United States —.

Page	Line	Corrections to Text
6	21	Change "Eighth Circuit District Court of Appeals" to — Court of Appeals For the Eighth Circuit, —.
6	22	Change "clause of the constitution and the admonition" to — clauses of the Constitution (Amendments V and XIV) and the Admonition —.
6	23	Change "federal rules of civil procedure" to — Federal Rules of Civil Procedure, —.
6	26	After "reflects" insert —, — and change "substitute factual character" to — substituted a factual characterization thereof —.
6	27	After "mandate" insert —. — and after " . " delete "in which" and change "a" to — A —
7	3	After "it" insert — (Amendment XIV) and after "hospitals" insert — must —.
7	5	After "pregnancy" insert — Doe v. Poelker, 515 F.2d 541(C.A. 8th, 1975) —.
7	23	After "life" insert —, —.
7	26	Change "in" to — an —.
7	28	After "forever" change " . " to —, —.
7	29	Change "For" to — for —.
8	15	Change "?" to — ! —.
8	28	After "convenience" delete "." and add —, — and change "At" to — at —.
9	2	After "technology" delete " . " and insert —), Roe v. Wade, 410 U.S. 116 (1973) and 153, 154, 156, 157, 158, 159, 160,

Page	Line	Corrections to Text
		163 and 164; Doe v. Bolton, 410 U.S. 179 (1973); United States v. Vuitch, 402 U.S. 62 (1971). —.
9	3	Change "that date" to — these dates, —.
9	6	Change "cases it unleased" to — cases, It unleashed —.
9	8	Change "sojurn" to — sojourn — and After "here." insert — The groundwork of such mischief, of course, has its antecedents in United States v. Vuitch, 402 U.S. 62 (1971). See: Roe v. Wade at p. 159, "to the same effect" (language of the Court in Roe v. Wade). —.
9	10	Change "unleasing" to — unleashing —.
9	13	Change "catastrophe if accepted (and God forbid)" to — catastrophe, if accepted, (and God forbid), —.
9	16	Delete paragraphs beginning "Petitioners are, etc.," and ending "August 8, 1975" and insert — Petitioners are concerned about the action of the United States Court of Appeals for the Eighth Circuit in appeals from the United States District Court for the Eastern District of Missouri, Eastern Division, *No. 74-1232*, Doe, et al. v. Poelker, (etc.), et al., Petn. for Cert., (App. ("Addendum") pp. A-11 - A-17; on Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, Brief of Petitioners, p. 2, Sec. B.; 497 F.2d 1063, (C.A. 8th, 1974), *and No. 75-1069*, most particularly, with respect to its mandate

Page	Line	Corrections to Text
		given July 8, 1975 (Doe, et al. v. Poelker, (etc.), et al., Petn. for Cert., App. ("Addendum") p. A-55), following an initial opinion-judgment of April 14, 1975 (See: Ibid., Petn. for Cert., App. ("Addendum") p. A-27) as modified May 7, 1975 (See: Ibid., Petn. for Cert., App. ("Addendum") p. A-40-A.-42) and June 2, 1975 (See: Ibid., Petn. for Cert., App. ("Addendum") p. A-44-A-53); Doe v. Poelker, 515 F.2d 541 (C.A. 8th, 1975).
		As a corollary to such mandate, and such opinion with modifications, and such judgments, orders and decrees, Amici are further concerned in particular about the Orders, Judgment, Decree and Order and Memorandum of the United States District Court for the Eastern District of Missouri, Eastern Division, issued Friday, August 8, 1975 (See: Ibid., Petn. for Cert., App. ("Addendum") p. A-55 and sequence, Ibid., A-56-A-59). —.
10	15	After "participation" insert — therein —.
10	16	After "among" delete "the" and insert — themselves as —.
10	18	After "If" delete "they" and insert — If such opinions, judgments, and decrees of the United States Court of Appeals for the Eighth Circuit —.
10	19	Change "court" to — Court —.
10	21	After "Bolton," insert — (a construction not conceded herein), —.

Page	Line	Corrections to Text
10	22	Change "court" to — Court —.
10	26	After "Roe" delete "v." and insert — and —.
10	33	After "Motion" delete "herein preceding Brief Proper)." and insert — and Application of Amici for Enlargement of Time to File Brief, p. vi). —.
11	5	After "opinions" delete "issuing forth" and insert — of these lower Federal Courts aggravating such broad attacks upon human life by this Court. —
11	6	Delete "from our lower Federal Courts." —.
11	11	After " 'Liberty'." insert — (—.
11	12	Change "of, Responsibility as well as right," to — of Responsibility, as well as Right), —.
11	26	After "fornication" insert — (Eph 5:5; 1C 6:9; Gal 5:19; Rom 1:18-32) —.
11	32	After "Mercy" delete "." and insert — (See: Ex 21:22-25; Ps 139:13-16; Ps 51:5; Jer 1:4,5; Lk 1:24-56). These latter citations are from Rev. Dr. George W. Knight, III, Th. D., from an article "Abortion: How Does the Word of God Regard the Human Fetus?", The Presbyterian Guardian, September, 1971, pp. 100-102. Now reprinted as a separate piece. Eleven articles for the forthcoming *Wycliffe Bible Encyclopedia* (Moody), 1974. —

Page	Line	Corrections to Text
11	34	After "redress" insert — (Amendment I) —.
12	4	Change "Buchenwold" to — Buchenwald —.
12	10	After "LIBERTY" add —, —.
12	16	After "ence" insert — (Initiated by Vuitch, followed by Roe and Doe and now Doe v. Poelker by the United States Court of Appeals for the Eighth Circuit) — and Change "is" to — are —.
12	18	Change "sows" to — sow —.
12	21	After "Independence" insert — (solemnly stating that: "we hold these truths to be self-evident that all men are created equal; that they are endowed by the Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness;" and —.
12	22	After "of" insert — "[their] lives, [their] fortunes, and [their] sacred honor") —.
12	27	After "thereto" delete —, — and after "welfare" delete —, — and insert — — —.
12	29	After "slavery" insert —), —.
12	30	After "they" insert — also — and after "?" change "This" to — It —.
13	30	Change "charter" to — character —.
14	16	Delete paragraphs beginning "Among other things . . .." and ending on page 15, line 2 ". . . gift to mankind (Part I)." and insert —

Page	Line	Corrections to Text

Among other things, it is said with callous indifference to the sanctity of human life by the scrivener in Roe v. Wade at 410 U.S. 166, and following:

> "This Texas federal appeal and its Georgia companion Doe v. Bolton, . . . present constitutional challenges to state criminal abortion legislation. The Texas statutes . . . are typical . . . the Georgia statutes, in contrast have a modern cast, . . . reflect [ing] the influences of recent attitudinal change, of advancing medical knowledge and techniques, and of new thinking about an old issue . . . [challenges] to population growth, pollution, poverty, and racial overtones . . . complicat [ing] . . . the problem."

At page 117 Lochner v. New York (198 U.S. 45, 76 (1905)) is wrenched out of context to provide a backdrop to what is to follow.

In Part I acknowledgment is made of a previous century plus (1854) of an adoption of a criminal abortion statute by Texas. Studies of the history of statutes similar to that of Texas and passed by many other states indicate a similar and even older longevity, during all of the early active period of such legislation. The State population

Page	Line	Corrections to Text
		vis a vis legislatures were dominantly Christian and Protestant, not Catholic, and in fact such legislation can be shown on the medical, scientific and legislative history, to have been passed to protect the unborn, a gift of human life, in pro-creative cooperation between men and women with the Creator, and as the first and singular gift to mankind. —.
15	3	After "II" insert — (at p. 120 of the Roe v. Wade case) —.
15	6	After "III" insert — (at p. 123) —.
15	8	After "under" insert — 28 U.S.C. — and Change "suggestion" to — suggesting —.
15	9	After "certiorari." insert — Perhaps the Court should similarly review this case as one reviewable on appeal. —.
15	18	After "describes" insert — that —.
15	19	After "Statutes" insert — is that they —.
15	20	Change "as . . . improperly avoiding a right . . . by [a]" to — improperly invade a right, . . . possessed by the —.
15	21	After "pregnancy." insert — " — and after "real" insert —, —.
15	22	After "What" insert —, — and after "woman" insert —, —.
18	19	After "about" delete "causes" and insert —, — what is a pregnant woman, vis-a-vis, what a woman conceives-comes —.

Page	Line	Corrections to Text
18	20	After "from" insert — Father —.
18	21	After "1976." insert — Father —.
23	11	After "One" insert — a Kelly Girl — and delete "Wednesday" and after "Starting" insert — Tuesday — and After "August" change "18" to — 17 —.
23	12	After "at" delete "8 A.M." and insert — 12:30 P.M. — and after "Children" delete "." and insert — : —.
24	1	After "Protection" insert — Clause —.
24	15	After "(See Exhibit II)" insert — — —.
26	11	After "12" delete "mo-" and insert — addressed to the Honorable Michael Rodak, Jr., Clerk of this Court, requesting he file the accompanying Motion and Application of Amici Curiae for an Extension (Enlargement) of Time . . . to File Brief in Support of Petitioners, etc., (See: pp. iv-ix and Note 1, pp. 1-3 of this Brief).—
26	12	Delete — tion for time and Note 1 of brief. —and change "moved" to — move —.
26	13	Change "brief material and appendix materials" to — Brief Material and/or a *Supplemental Brief* and Appendix —.
A-1	11	After "10551" insert — from *Commentary*, Volume Sixty, December, 1975, p. 81. *Commentary* is published monthly by the American Jewish Committee. Editorial & Business Offices: 165 E. 56th St., New York, N.Y. 10022 —.

Page	Line	Corrections to Text
A-2	9	After "1976" delete "." and insert —. p. 67. —.
A-4	1	Change "20" to — 16 —.
A-4	34	Delete — Milton F. Svetanics, Jr. —.
A-4	35	Delete — 27th Ward —.
A-5		After "A-5" and above line 1 insert — YES — 4 —.
A-7	12	After "of" change "au" to — Au —.
A-7	13	Change "gustian" to — gustinian —.
A-7	25	Change "no" to — not —.
A-8	20	Change "August" to — Augustine —.
A-8	35	Change "Aug." to — Augustine —.
A-10	14	Change "if" to — is —.
A-11	23	Change "of" to — as —.
A-11	29	Change "to" to — [at] —.
A-12	12	After "Conception" insert — but many other points of Catholic Doctrine could be more —.
A-12	32	After "with" insert — the —.
A-13	17	After "abortion in" insert — the —.
A-13	18	After "by" insert — the —.
A-13	21	Change "analyses" to — analizes —.
A-13	22	After "to" insert — my —.
A-14	12	Change "trary" to — trariwise — and delete "to abortion" —.
A-14	31	Change "as" to — on —.
A-16	30	After "member of" insert — [the] —.
A-17	16	After "at" insert — my —.

INDEX

Page

Covering Letter of Counsel for Amici to the Clerk of the Court, Dated August 12, 1976, and Motion of Amici Curiae for "Enlargement," (extension of time,) etc., to File Brief iv

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F. Dossier of Amici A-17

Cases Cited

Cox v. Louisiana, 391 U.S. 536 (1965) 24

Lemon v. Kurfzman, 411 U.S. 192 (1973) 24

Lochner v. New York, 198 U.S. 45 (1975) 14

Roe v. Wade, 410 U.S. 116 14

Miscellaneous Cited

Black, A Constitutional Faith (1968) 60 24

Revised Code of the City of St. Louis (1960) Chapter 145 24

Rule 52(A) Federal Rules of Civil Procedure 6

Robert E. Ratermann
Attorney at Law
11232 Bellefontaine Road
St. Louis, Missouri 63138
741-1352

August 12, 1976

Hon. Michael Rodak, Jr.
Clerk, Supreme Court of the United States
Washington, DC 20543

Re: Poelker, etc., et al. v.
Doe, etc., No. 75-442

Dear Mr. Rodak:

Would you please file the accompanying *Motion for an Extension (Enlargement) of Time in Which to File Brief* for my clients, Amici, the Honorable James R. Butler, Councilman, Second District, St. Louis County, Missouri, et al., under what are believed to be extraordinary circumstances.

Would you please further bring this motion to the attention of Justice Harry A. Blackmun, Associate Justice and Circuit Justice of the 8th Judicial Circuit in which the above cause has arisen, or as "the Court of the Chief Justice will reasonably instruct you," Rule 50(4).

Please note from the motion and consider this "accompanying request for oral argument of the motion and application to be supported by brief", if necessary, and please bring this to the attention of the Honorable Harry A. Blackmun, Associate Jus-

tice, etc., Rule 50(1) and 34(2) for reasons of "extraordinary circumstances." Thank you.

Respectfully,

ROBERT E. RATERMANN
Attorney for Amici Curiae

RER:deh

Enclosure: Motion

cc: Mr. Frank Susman,
Attorney for Respondents
Mr. Jerome M. McLaughlin,
Attorney for Amici Curiae

Mr. Jack L. Koehr and
Mr. Eugene P. Freeman,
Attorneys for Petitioners

In the
Supreme Court of the United States

October Term, 1975

No. 75-442

JOHN H. POELKER, Mayor of the City of
St. Louis, Missouri,

and

R. DEAN WOCHNER, M.D., Director of Health and Hospitals,
and Acting Commissioner of Hospitals of the
City of St. Louis, Missouri
Petitioners,

vs.

Jane Doe, and a Class,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

Motion and Application* of Amici Curiae, for an Extension (Enlargement) of Time in Which to File Their Brief in Support of Petitioners and Request, if Necessary, for Oral Argument Thereon

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Amici Curiae are among others the following: the Honorable James R. Butler, Councilman, Second District, a Political Subdivision of St. Louis County and the State of Missouri; Alan J. Bailey, M.S.W.; Ann O'Donnell, R.N., Chairman of the Eastern Region of Missouri Citizens for Life; Edward A. O'Donnell; William Murphy, M.S.W.; Dr. William Brennan, M.S.W., Ph.D.; George Ryan, M.S.W., A.C.S.W.; Edward Ratermann; Dr. George W. Knight, III; Robert E. Ratermann, Pro Se, Member of Lawyers for Life; Theodore J. Petersen; Joseph J. Heithaus, III; Eleanor Heithaus; James D. Schonhorst; Dorothy Schonhorst; Ronald Merideth; Mary Jeanne Merideth; Barbara O'Mara; Nancy J. Dougherty; Kathy Begley; and Judith A. Cassilly and Organization, Social Workers for Life; in Support of Petitioners.

Motion and Application* of Amici Curiae, for an Extension (Enlargement) of Time in Which to File Their Brief in Support of Petitioners and Request, if Necessary, for Oral Argument Thereon

---

* Request for oral argument accompanies this application, Rule 50(1). Proof of service on all other parties accompanies this motion and application, Rule 50(2). Submitted to the clerk with cover letter, Rule 50(1).

* Request for oral argument accompanies this application, Rule 50(1). Proof of service on all other parties accompanies this motion and application, Rule 50(2). Submitted to the clerk with cover letter, Rule 50(1).

Pursuant to Rule 50, "APPLICATIONS TO INDIVIDUAL JUSTICES; PRACTICE IN CHAMBERS," Amici, the Honorable James R. Butler, Councilman, second district, St. Louis County, Missouri, et al., move and apply* for an extension of time in which to file their brief in support of Petitioners with this Honorable Supreme Court of the United States, addressing same to the Honorable Harry A. Blackmun, Associate Justice thereof, the Court being in vacation, and in the spirit of Rule 50(4), submitting same to the Honorable Michael Rodak, Jr., Clerk, Supreme Court of the United States for prompt transmittal to said Justice, and/or the Justice concerned. Rule 50(1), (4), (6), on the grounds that:

1. From July 6, 1976, the date of the court action in the above case, granting "the motion of James R. Butler, et al., for leave to file a brief as amici curiae," until Thursday, July 14, 1976, counsel for said amici was out of his city of residence and away from his house and office.

2. On or about Monday, July 11, 1976, counsel for amici, Robert E. Ratermann, at about 4:30 p.m. New York time, learned from his wife, the late deceased Helen C. Ratermann, that she had taken seriously ill and was thereafter on Wednesday, July 13, at about 2:30 p.m. St. Louis time taken by ambulance in an unconscious state, near death, from the family residence to Christian Northeast Hospital, St. Louis County, Missouri, to the emergency service. Approximately ten (10) hours thereafter she was transferred to the intensive care unit, where she remained critically ill and only intermittently conscious until Thursday, August 4, 1976, at which time she died at approximately 7:30 a.m. Her remains subsequently were buried Saturday, August 6, 1976, from the Church of Our Lady of Loretto to Calvary Cemetery in St. Louis, Missouri.

3. Counsel has devoted as much time as he felt was humanly possible to prepare a brief for the amici in the above case. Due

to his present understanding that the brief of his clients, the same named amici curiae, must be filed by him on their behalf on August 20, 1976, he has concluded that anything he may be able to file in this regard within the remaining days on or before August 20, 1976, would be less than his best on their behalf.

4. In addition he is at present not in the best of health and has lost the assistance of some staff and in need of raising additional funds to cover expenses to be incurred. These difficulties he expects to correct with the assistance of others in a matter of several days.

5. The case involves momentous constitutional consequences. The Court, in the sincere opinion of amici, will either affirm the "Sanctity of Life," or deny it in its totality in its eventual opinion. It will choose life or death. In Deuteronomy Ch. 30 V. 19, it says out of the mouth of God: "I have set before you life and death, the blessing and the curse. Choose life, then, that you and your descendants may live, by loving the Lord, your God, heeding his voice, and holding fast to him." This additional ground of the motion is alleged as a brief additional ground, sincerely offered to this Court.

WHEREFORE: Amici, by their counsel, respectfully pray the Honorable Harry A. Blackmun, Associate Justice, "duly allotted to the circuit within which the case arises,": (1) leave of court for an additional forty-five (45) days, counting from and after the 20th day of August, 1976, in which to file their brief in the above cause; or (2) leave of court for such additional such time as is deemed proper in the "extraordinary circumstances" Rule 34(2); and, if necessary, (3) leave for oral argument, supported

by brief, on the above motion and application, all in support of Petitioners.

Respectfully submitted,

ROBERT E. RATERMANN
Attorney for Amici Curiae, the Honorable James R. Butler, et al., etc., in the above captioned case

Copy sent by first class
special delivery U.S. mail to:

Mr. Frank Susman,
Attorney for Respondents

Mr. Jerome M. McLaughlin,
Attorney for Amici Curiae

Mr. Jack L. Koehr and
Mr. Eugene P. Freeman,
Attorneys for Petitioners

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 75-442

JOHN H. POELKER, Mayor of the City of St. Louis, Missouri,
and
R. DEAN WOCHNER, M.D., Director of Health and Hospitals, and Acting Commissioner of Hospitals of the City of St. Louis, Missouri,
Petitioners,

vs.

JANE DOE, and a Class,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
For the Eighth Circuit

BRIEF AMICI CURIAE

Of the Honorable James R. Butler, Councilman, Second District, a Political Subdivision of St. Louis County and the State of Missouri; Alan J. Bailey, M.S.W.; Ann O'Donnell, R.N., Chairman of the Eastern Region of Missouri Citizens for Life; Edward A. O'Donnell; William Murphy, M.S.W.; Dr. William Brennan, M.S.W., Ph.D.; George Ryan, M.S.W., A.C.S.W.; Edward Ratermann; Dr. George W. Knight, III; Robert E. Ratermann, Pro Se, Member of Lawyers for Life; Theodore J. Petersen; Joseph J. Heithaus III; Eleanor Heithaus; James D. Schonhorst; Dorothy Schonhorst; Ronald Merideth; Mary Jeanne Merideth; Barbara O'Mara; Nancy J. Dougherty; Kathy Begley; and Judith A. Cassilly and Organization, Social Workers for Life; in Support of Petitioners.

NOTE

1. Counsel for Amici bring to the Court's attention in connection with the motion and application for an enlargement or extension of time in which to file this brief that on Monday

morning of the 16th of August, at approximately 11:30 a.m., a call was placed to the Clerk's office for the purpose of leaving word of a temporary change of address and phone number so as to facilitate response through the Clerk of any action on said motion.

The Honorable Michael Rodack, Jr. acknowledged the call personally, took the proffered information, acknowledged receipt of the motion sent by Mailgram and by typewritten communication at approximately 11:45 p.m. Friday, August 13th, 1976 by Western Union and approximately 1:00 a.m. by the United States Postal Service, Saturday, August 14th, 1976.

Also, for the record Amici states by their counsel that he received a call from Western Union at 3:15 a.m., August 14th indicating that because of technological failure of their equipment they had lost part of the contents of the above described Mailgram, whereupon, counsel redictated that portion of the Mailgram thus missing between the hours of 3:15 a.m. and 4:30 a.m.

The Honorable Michael Rodack, Jr., Clerk of this Honorable Court indicated according to my request in the above mentioned covering letter to the motion addressed to him that he had brought the matters suggested therein to the attention of the Honorable Harry A. Blackmun, Associate Justice and Circuit Justice of the 8th Judicial Circuit and that it was the Justice's opinion as well as that of his own that a motion such as had been submitted by Counsel for Amici under Rule 34 could not be granted, that said rule applied rather in their opinion only to Parties to a case before this Honorable Court.

The Clerk (as Counsel best recalls) asked Counsel when he thought he could file his client's brief realizing (as both of us did) that the filing date for briefs in this case was given by the Clerk of the Court in mimeographed instructions attached to

the original letter to Mr. Eugene P. Freeman, July 6th, 1976, as August 20th, 1976.

Counsel for Amici's response in the light of all the above was that he felt himself bound to do the best he could in a brief to be lodged with the Court August 20th, 1976.

Counsel for Amici further believes in the light of the "momentous constitutional consequences" of any decision on the merits of this case, that, perhaps, the Court would consider whether the rules as they stand should be suspended and Amici in the circumstances be allowed to file at a later date by its order timely noticed to counsel or additional brief material, and on this suggestion, so moves herein now, for such consideration.

2. The Statement of jurisdictional grounds, The Constitutional provisions involved, the questions presented and the statement of the case are omitted from this Amici Curiae brief, since they are amply stated in the application and petition for a writ of certiorari of August 20th, 1975-September 21, 1975 granted by this court July 6, 1976 and in the brief of the petitioners being filed August 20th, 1975, pursuant to such writ of this Court. Amici further adopt the contents of the single appendix agreed to by the parties July 22, 1976 and in preparation by the printer as set out in a letter under date of July 23, 1976 by Eugene P. Freeman, Attorney for Petitioners and addressed to the Honorable Michael Rodak, Jr., Clerk of this Honorable Court.

Amici adopt all arguments of petitioners on the points as presented in their brief to this Court and such other matters of Petitioners' brief,—insofar as—they are not inconsistent with arguments and points which the Amici find it necessary to present in support of the basic issues as they see them raised by the case.

INTEREST OF AMICI CURIAE

The individuals whose names are appended hereto as Amici Curiae are: the Honorable James R. Butler, Councilman, Second District, St. Louis County Council, St. Louis County Missouri, said District being a political subdivision of St. Louis County, State of Missouri, United States of Amercia; Alan J. Bailey, M.S.W., "citizen of the United States (as are all of the personally named Amici), member world community of persons conceived, born and who will one day die, holding firm to the tenets of the Declaration of Independence, especially that which speaks of the endowment of all men, holding to the Judeo-Christian tradition, including a belief that every individual is indeed a human person of absolute value from conception to natural death, serving the human community and the protection of life, and professionally working in the field of social work as an advocate and helper of children and adults, whose lives are in danger due to health, social or emotional problems, and even the laws of the state, opposed to abortion on demand and to the United States Supreme Court decision proclaiming that an individual woman and her doctor have the awesome right to kill, currently working with married and unmarried women facing unwanted and untimely pregnancies, helping them with the social, emotional, psychological and spiritual needs which allow them to bring their children to term and accept viable alternatives to abortion": Alan J. Bailey, M.S.W.; Ann O'Donnell, R.N.; Edward O'Donnell; William Murphy, M.S.W.; Dr. William Brennan, M.S.W., Ph.D.; George Ryan, M.S.W., A.C.S.W.; Edward Ratermann; Dr. George W. Knight, III, Ph.D., Robert E. Ratermann, Pro Se, Member of Lawyers for Life; Theodore J. Petersen; Joseph J. Heithaus III; Eleanor Heithaus; James D. Schonhorst; Dorothy Schonhorst; Ronald Merideth; Mary Jeanne Merideth; Barbara O'Mara; Nancy Dougherty; Kathy Begley; Judith A. Cassilly; and Organization, Social Workers for Life. (See Appendix A-1 for more particulars on the interest of the

above named Amici, and other persons, members of Social Workers for Life, whose membership is several hundred including in addition to the above the following: Roger O. McManus, B.S., M.S.W.; Bonnie J. McManus, B.S., M.S.W.; John C. Goeke, D.S.W.; Thomas J. Mangagna, B.A., M.S.W.; John M. Lally, M.S.W.; Anne Sullivan, A.B.; Arthur Joseph Korte, M.A.; Barry McLaughlin, B.S., M.S.W. (See for more particulars, Appendix F-1 and legend.)

ARGUMENT

I

Amici Adopt Brief for the Petitioners With Some Special Observations

Amici adopt brief for the Petitioners on Writ of Certiorari to the United States Circuit Court of Appeals.

On page three of Petitioners' Petition for a Writ of Certiorari questions are presented for review. Amici, with respect to point three, based on the entire record certified to this Court, observe that in the entire history of appellate review before this Court know of no line of cases such as this one and by impression several others in some degree where Article III of the Federal Constitution has been more flagrantly filed by the Plaintiffs with respect to the condition prerequisite that a case for review by a Court of Appeals must have the character of a controversy before jurisdiction lies in view of the fact on the record that an abortion was procured "within five days of filing and prior to summons of one defendant and before the case is heard by the District Court".

Amici by the counsel are profoundly shocked that the U.S. Eighth Circuit District Court of Appeals contrary to the due process clause of the constitution and the admonition of Rule 52 (A) of the federal rules of civil procedure substituted their own constructions of the complaint of the plaintiff as evidenced in the entire record and on such evidentiary matters as the entire record reflects substitute factual character to reach their mandate in which a public official is personally called names by implication of the wording of the mandate unworthy of any Court in view of the character of his honor as Mayor of the city of St. Louis, Missouri.

With respect to point one Amici challenge that a woman has a federal constitutional privacy right not to bear her child but to abort it and that because of her poverty, public hospitals see to it that her request is satisfied within her first trimester of pregnancy where no medical indications exist.

II

The Opinion-Judgment of April 14, 1975 as Modified May 7, 1975 and June 2, 1975, the Denial of the Request of Petitioners for Rehearing June 24, 1975 by the United States Court of Appeals for the Eighth Circuit in Causes Numbered 74-1232 and 75-1069, the Mandate on July 8, 1975, and the Orders, Judgment, Decree and Opinion of the United States District Court for the Eastern District of Missouri, Eastern Division, Issued Friday, August 8, 1975 Are Unconstitutional in Every Relevant Aspect of the Constitution Wherein the Highest Value Is Placed Upon Every Human Life, Every Human individual, Every Person Classically Embodied in the Universal!, "The Sanctity of Life". . . .

A. **These opinions, judgments and decrees have no warrant or justification in the prior decisions of this court.**

We want to speak in universal language to men of faith, men of little faith, men of no faith so that we may come to know more completely the gift of life of personhood which the Creator gives to all in His mysterious and loving Providence. And having said this, it is only fitting and proper that we set down, herewith, in expression of our profound respect and love for our Creator. To our God, our beloved Creator, be forever adoration, surrender, love, praise, honor, and glory forever. For His first gift, Life to each of us by name.

Against such a course of action by this government, one is moved by what has been described as a Responsorial Psalm (Dt.

32), part of the Liturgy for Monday, August 16, 1976, as reported in Pray Together, Saint Francis Xavier (College-Church) Parish Community, St. Louis, Missouri, for the Feast of St. Stephen of Hungary at page 42:

> "You have forgotten God who gave you birth.
>
> You have forgotten God who gave you birth.
>
> You were unmindful of the Rock that begot you.
>
> You forgot the God who gave you birth.
>
> When the Lord saw this, he was filled with loathing
> and anger toward his sons and daughters.
>
> You have forgotten God who gave you birth.
>
> 'I will hide my face from them,' he said,
> 'and see what will then become of them.
>
> What a fickle race they are,
> sons with no loyalty in them?
>
> You have forgotten God who gave you birth.
>
> Since they have provoked me with their "no-god"
> and angered me with their vain idols,
>
> I will provoke them with a "no-people";
> with a foolish nation I will anger them.'
>
> You have forgotten God who gave you birth."

Make no mistake about it, there are a vast majority of citizens and others that are resolutely committed to undo the dishonor brought upon this Honorable Court. As it was persuaded by clever political, sociological, etc., reasoning to do what it did on January 22, 1973,—in summary—*declaring that a woman with child may abort it with the aid of her physician at will to satisfy her convenience.* At whatever point, in the gestational continuum of life, that is to say, from the first moment of conception to the last moment before natural birth (or such natural

birth as may be aided by the blessings of present day biological science, medicine, and technology.

On that date at whatever hour this Court affixed its official approval of such an unethical and immoral public standard of conduct and behavior as reflected in the Vuitch, Roe v. Wade and Doe v. Bolton cases it unleased upon this nation and its people one of the most tragic attacks on mankind ever recorded in the annals of man's sojurn here.

In truth, it is a libertine non-standard of political life and morals for the nation, unleasing a policy, providing an impetus for and interposing death nationally, with international implications for the human race, which can only lead inevitably, to ethical and moral catastrophe if accepted (and God forbid) as a universal political norm of conduct sanctioned by the State.

Petitioners are particularly concerned about the action of the United States Court of Appeals for the Eighth Circuit in causes No. 74-1232 and 75-1069 in its mandate given on July 8, 1975, following an initial opinion-judgment of April 14, 1975 as modified May 7, 1975 and June 2, 1975, as set out in pertinent aspects of the appendix of the parties and in brief of petitioners (printed copy is available for citation).

As a corollary to such mandate, Amici are concerned about the orders, judgment, decree and opinion of the United States District Court for the Eastern District of Missouri, Eastern Division, issued and commencing April 14, 1975 and concluding with mandate Friday, August 8, 1975.

In general Amici urge upon this Court that said mandate, orders, judgment, decree and opinion are unconstitutional in every relevant aspect of the constitution, *oriented as it is to the sacredness of human life*, individuated and personified, otherwise

spoken of in the wisdom of the ages as "the sanctity of life", and of course, most particularly, when speaking of the human kind.

Of course, the real mischief that we complain of here, is that perpetrated by the United States Court of Appeals for the Eighth Circuit, rather than the obedience to its mandate forced upon the District Court, the Honorable Judge Roy W. Harper, presiding judge therein, for it is quite evident from the entire record, that this Honorable Judge found the complaint of Respondents without merit and the mandate of the Court of Appeals abhorrent and alien to everything this nation has stood for in its origin, its birth, and development to very recent years. That such a Judge in his late years should have to bend to a Higher Court such as the Eighth Circuit, made up of some men infected with the audaciousness to impose upon this nation and its people a public policy of active participation and political alienation among the Americans in the slaughter of the innocent unborn, is indeed a heavy burden to carry.

B. **If they might be construed as logical corollaries of the prior decisions of this court, and most particularly, in the line of cases commencing with the Vuitch case and going on to Roe v. Wade and Doe v. Bolton, then these latter mentioned cases of this court should be reviewed, clarified, curtailed in breath of application to abortion and, of course, in the opinion of very many, including amici, and on the authority of the greatest wisdom available to man, reversed.**

The cases of *Roe v. Doe* (and Vuitch) are without precedent in the law of any nation amici are aware of, in the broad attack upon human life by this prestigious Court. The train of decisions in the lowest Federal Courts that have obeisantly followed the edicts of these opinions are too numerous to read and refute point by point in the short time counsel for Amici have, taking into account his present circumstances (see Motion herein preceding Brief Proper).

However, it can reasonably and truly be said that the general citizenry of our nation are not so gullible as to fail to note the almost daily frequency with which the newspapers of our nation, our radio stations, and our television stations and networks announce new and deadly opinions issuing forth from our lower Federal Courts. One is inclined to add to the expression "deadly" that of "devilish"; their "worldly" defiance of the Creator Himself, or cowardly obeisance to the opinions in *Vuitch*, *Roe* and *Doe* shock the conscience of a growing number of Americans. Such defiance or obeisant submission to a fundamental abuse of the concept of "Liberty", necessarily rooted in a correlative sense of, Responsibility as well as right, does violence to the law written by the Creator in the heart of every man and woman.

It is further obvious to any reflective American that we have strayed a long way, or far afield from the right use of our passions and sexuality and have become slaves of the flesh. Who speaks of fornication today with a sense of impropriety, ethical dalliance, amoral behavior or sin, whether it be by a single act or habit of the infidelity of married men and women. The nation advertises with regularity the estimated fifty percent or better collapse of marriages solemnized in civil and religious ceremonies with the resultant catastrophic violence done to the offspring of such unions. Do we deliberately forget the admonition of St. Paul that along with those given over to murder and fornication among a long list in violation of the Second Commandment (like unto the First) that they will not enjoy the beatitude of ETERNAL LIFE?

The Sacred Writers make such truths abundantly clear and grave passages of Holy Writ tell us, that God's Goodness is not mocked as of course other passages tell us of God's Infinite Mercy.

The people of this nation have nowhere to turn in a political sense at the present but to this Honorable Court for a redress

of what at the present time in plain English is legally sanctioned carnage of the unborn child, no different than what was described at Nuremberg as "crimes against humanity," at Dachau, Buchenwold, Auschwitz and the like.

This Court should not under God legalize such inhumanity, cruelty, barbarism, perpetrated on human life, cradled and nurtured by His design in the womb of woman, or give aid and comfort and abet those who believe (if they do) in a liberty which in and of itself brings condemnation and negates responsibility to protect, defend and foster TRUE LIBERTY which undertaking identifies the Sons of God.

This nation with the frequent assistance of this Court has imposed upon itself an obligation to support abortion for the poor, under an assumption, really defined euphemistically, as "medical indications" and including thereunder mere convenience. Applications of such public amorality standard is rooted in total selfishness, without reason, without faith, without hope, without love, without imagination, without possibility, and sows the seeds rapidly and wildly of our own collapse as a nation contrary to its avowed ideals. For who could say that the 56 Signers of the Declaration of Independence, who gave so much of their lives, their fortune and their sacred honor to foster a great people, could ever have contemplated a great future and a great promise for mankind when they set their hand to that great document (many of whom subsequently urged the adoption of a Constitution, the general purpose set out in the Preamble thereto,—to promote the "general welfare," also urged the adoption of our Bill of Rights and grieved over the lack of unanimity in abolishing in their time the institution of slavery had they urged public support of the practice of abortion? This is a matter of some substantial historical record, that they of course did not!

This Court's action in the spirit of the above comments with respect to the issue in the case before this Court will either

vindicate once again the most basic human right given by the Creator and recognized explicitly in the Declaration of Independence and by reasonable construction in the Constitution, Bill of Rights and subsequent Amendments, or by converse action, attempt to make cowards of us all, and it must be said, enemies, hostile to the Creator.

Critic of Roe and Doe Continued

There is really only one question in this case and all those decided in any federal court and pending therein on the subject of the "Sanctity of Life," and that is: is our Constitution and the Declaration of Independence (and dependence on the Creator) now permanently to receive such a materialistic, secular interpretation, that on the very question of the gift of our lives from the beginning thereof to their end, this Constitution and Declaration is to be construed by this Court subject to an ever broadening scope of public policy deciding who shall live, and who shall die, and when?

Putting the matter in another way, is our Constitution to be so construed by this Court as to authorize violent interference with human life? If the answer in fact is yes, culpably then, the contemporary servants of the people of this nation, who govern by a trust and grant of power from the people, under God, thereby incur a conviction of hostility to the Creator.

On this score culpability rests more particularly upon conclusions contrary to nineteenth-twentieth century science, eighteenth century development of Republican-Democratic politics leading to the birth of a nation, in which men and women sacrificed life, fortune, sacred honor to achieve it, and knowing yet, the flaw in their charter, had to struggle to rid it of the denial of full humanity to the Indian and Black by writing into the document the abolition of slavery in the nine-

teenth century, for which again men and women gave their lives, sacrificed their fortune and their sacred honor, and again in the twentieth century finally with the aid of this Honorable Court, cut through the pretense of 100 years non-compliance, to affirm the sanctity, the dignity of every person born into this world.

The culpability further rests, not only on the scientific data with which we are now blessed, and the political advancement (until recently so highly lauded) but on other sources also of knowledge, understanding, and reason in the distilled wisdom of philosophy, guided by the illumination of the Creator revealed in Yahweh, and for the Christian revealed of the Father, in Jesus Christ, in union with the Spirit, who continue to pour out blessings and knowledge and understanding and reason and wisdom in every field of human endeavor.

Among other things, it is said with callous indifference to the sanctity of human life by the scrivener in *Roe v. Wade* at 410 U.S. 116-166

> "The Texas federal appeal and its Georgia companion Doe v. Bolton, . . . present constitutional challenges to state criminal abortion legislation (in effect for a century in the former state of Texas and in contrast in the state of Georgia with a modern cast, reflecting the influence of recent change, advancing medical knowledge and techniques, new thinking about an old issue) . . . challenges to population growth, pollution, poverty, and racial overtones . . . complicating . . . the problem."

Lochner v. New York, 198 U.S. 45, 76 (1975), is wrenched out of context to provide a backdrop to what is to follow. Acknowledgment is made of a previous century of adoption of criminal abortion statutes when the population was dominantly Christian and Protestant, not Catholic, to in fact protect the life of the unborn gift of human life in pro-creative

cooperation between men and woman with the Creator as the first and singular gift to mankind (Part I).

In Part II account is given that the complainant relies on a "right of personal privacy," alleged to be protected by the First, Fourth, Fifth, Ninth and Fourteenth Amendments.

In Part III the Court opts for review of the case on appeal from a denial of injunctive relief and the declaratory aspects of the case below under Section 1253, though suggestion it should have come on petition for certiorari.

In Part IV, there is hint of a serious question of justiciability, standing and abstention on the record of the case, despite the conclusion with respect to Roe, reached in the opinion. Of course the Does back at that time (at page 127) of the opinion were refused standing because of the speculative nature of the complaint as not one of an actual case or controversy. Intervenor Dr. Halford failed to state a claim of "substantial and immediate threat to any federally protected right."

In Part V, first sentence at page 129 the court describes "the principal thrust of appellant's attack, on the Texas Statutes . . . as . . . improperly [avoiding] a right . . . by [a] pregnant woman, to choose to terminate her pregnancy. Here for real the Court puts its finger on the issue. What is a pregnant woman unless she is a woman who has conceived an individual human life beyond violation by any man. Dr. Bart T. Heffernan, M.D. tells us well what a woman conceives:

> "We have seen in recent years a strange, but sad to say not a new, phenomenon in the affairs of men. The data of science have been manipulated, denied or distorted to fit a political or sociologic posture. The abortionists have propagandized our citizens with pseudo-science in order to protect the theories and humanitarian claims of their cause. The blob theory, the main tenet of the tissue-of-the-mother

school of embryology, has been advanced for public scrutiny without so much as a note of public criticism from the scientific community or the medical profession.

Our society, because of these failures, stares at the wall of the abortorium and fails to see that it is no different from the barbed inclosures of another recent time. It is clean, aseptic and run by well-dressed, efficient men in white. The victims are anonymous and unseen. Psuedoscience has re-defined them in order to rob them of their rights.

It is in respense to this tragedy that the following data have been assembled. We should read this account with interest and some fascination, for it represents a biography of everyman during those moments of his greatest potential and most rapid development.

The unborn offspring of human parents is an autonomous human being.

Even before implantation in the wall of the uterus the unborn child may be responsible for the maintenance of the pregnant state in the maternal metabolism (1). The child whose tissue is antigenically different from the mother sets up protective mechanisms to prevent maternal immunologic responses from causing fetal distress (2). The newly formed child has a remarkable degree of metabolic autonomy (3). For example, the fetal endocrine system function autonomously (4).

The recent recognition of this autonomy has led to the development of new medical specialties concerning the unborn child from the earliest stages of the pregnancy, i.e., fetology and perinatology (56).

Modern obstetrics has discarded as unscientific the concept that the child in the womb is but tissue of the mother. As Dr. H. M. I. Liley, the New Zealand pediatrician (and research assistant to her famous husband, Dr. Albert Liley, who perfected the intra-uterine transfusion), has said:

> Another medical fallacy that modern obstetrics discards is the idea that the pregnant woman can be treated as a patient alone. No problem in fetal health or disease can any longer be considered in isolation. At the very least two people are involved, the mother and her chlid. (5 at p. 207)

From conception the child is a complex, dynamic, rapidly growing individual. By a natural and continuous process the single fertilized ovum will, over approximately nine months, develop into the trillions of cells of the newborn. The natural end of the sperm and ovum is death unless fertilization occurs. At fertilization a new and unique individual is created which, although receiving one-half of its chromosomes from each parent, is really unlike either (8, 6, 9; 10 at p. 18).

The events that follow fertilization are self-generated by the new individual under the guidance of his new and absolutely unique hereditary plan. The new combination of chromosomes sets in motion the individual's life, controlled by his own individual code (genes) with its fantastic library of information projected from the past on the helix of Desoxyribonucleic acid or DNA. A single thread of DNA from a human cell contains information equivalent to six hundred thousand printed pages with five hundred words on a page, or a library of one thousand volumes. The stored knowledge at conception in the new individual's library of instructions is fifty times more than that contained in the *Encyclopedia Britannica* (7). These unique and individual instructions are operative over the whole of the individual's life and form a continuum of human existence even into succeeding generations. Dr. Hymie Gordon, Chief Geneticist at the Mayo Clinic, states it thus:

> . . . from the moment of fertilization, when the deoxyribose nucleic acids from the spermatozoon and the ovum come together to form the zygote, the pattern

of the individual's constitutional development is irrevocably determined; his future health, his future intellectual potential, even his future criminal proclivities are all dependent on the sequence of the purine and pyrimidine bases in the original set of DNA molecules of the unicellular individual. True, environmental influences both during the intra-uterine period and after birth modify the individual's constitution and continue to do so right until his death, but it is at the moment of conception that the individual's capacity to respond to these exogenous influences is established. Even at that early stage, the complexity of the living cell is so great that it is beyond our comprehension. It is a privilege to be allowed to protect and nurture it. (71)" Bart T. Heffernan, M.D., The Early Biography of Everyman, Ch. 1, pp. 3-5. Abortion and Social Justice, Thomas W. Hilgers and Dennis Horan, Sheed and Ward, New York, 1972.

Another approach to what we are talking about causes in response to the question in a letter from Robert Brungs, S.J.

Under date of August 11, 1976, Robert Brungs, S.J., Director of the Institute for Theological Encounter With Science and Technology, in a letter to counsel for amici, states:

Dear Mr. Ratermann:

I have looked around and asked several people about books on embryology that might be useful to you. Unfortunately all the people I would most like to have asked are away on vacation. I do have one suggestion by way of a popularized treatment which, in fact, might be more valuable than an actual scientific approach. It is a book with which you may already be familiar: "The First Nine Months of Life" by Geraldine Lux Flanagan, Simon & Schuster, N.Y., 1962. It is somewhat out of date, but I believe that the information gained since 1960 in embry-

ology would support the description given here. George Corner, M.D., Prof. Emeritus of Embryology of Johns Hopkins says of it: "It gives a sensitive and scientifically impeccable account, illustrated with authentic photographs, of the hour-by-hour, month-by-month development of the human embryo from egg cell to birth." Copies of this book could possibly be obtained from the Archdiocesan Pro-Life Committee, 462 N. Taylor.

This book, already 16 years out of date, would represent a "minimalistic" statement. By this I mean that a statement like "The heart is usually beating by the twenty-fifth day" might no longer be accurate, but the inaccuracy (if any) would lie in the fact that the beginning of a heart-beat would be *earlier*, not later. In other words, we may now know more (by the use of more sensitive techniques) but that knowledge would push things like the on-set of a heart-beat *earlier* into the pregnancy. We can accurately say of the information in this book that it represents the later limits of the time of the beginning of the organ function, not the early limits.

Also, if I may, I'd like to point out just a few statements that might be of help:

(1) p. 18 "The pages that follow give us a kind of window into the womb. Through it we can watch a baby from his first moment, his real birth, which precludes the day of being born by nine months."

(2) "In this book, the age of the baby will always be computed from this beginning (i.e., fertilization). . . . The Chinese, by ancient custom, declared a child to be one year old at birth. They long ago acknowledged that we are not new at birth."

(3) "From their first hour the human cells are distinctly human."

(4) All of page 51 and p. 53.

(5) p. 59 "The month-old embryo is 10,000 times larger than the fertilized egg was. The single egg has given way to a finely structured if still incomplete body. In four more weeks, by the end of the second month, it will look quite like a tiny baby."

(6) 61-62 "In its seventh week it bears the familiar features and all the internal organs of the future adult, even though it is less than an inch long and weighs one-thirtieth of an ounce. It has a human face, with eyes, ears, nose, lips, tongue, and even milk-teeth buds in the gums. The body has become nicely rounded, padded with muscles and covered by a thin skin. The arms, only as long as printed exclamation marks, have hands with fingers and thumbs. The slower-growing legs have recognizable knees, ankles and toes.

The new body not only exists, *it also works* (emphasis mine—I believe this is extremely important). The brain, in configuration already like the adult brain, sends out impulses that coordinate the functioning of the other organs. The heart beats sturdily. The stomach produces some digestive juices. The liver manufactures blood cells and the kidneys extract some uric acid from the blood. The muscles of the arms and body can already be set in motion.

. . . Until adulthood, when full growth is reached between the years of twenty-five and twenty-seven, the changes in the body will be mainly in dimension and in the gradual refinement of the working parts."

There is much more of this kind of information in this book. I would recommend that copies be made available for the justices.

On another level, I have a few observations that may or may not be helpful. They probably will not be so persuasive to the justices but perhaps they ought to be made "for the record."

(1) The fourteenth amendment in effect "made" blacks "persons" before the law. Obviously nothing had changed in the blacks, so it would be better to state that the government finally recognized the personhood that blacks had had already in virtue of their humanness. In effect the amendment stated that personhood could not be denied on the grounds of some kind of "social dependency." The present Supreme Court, on the contrary, has denied personhood on the ground of "physical dependency", thereby discriminating on the basis of size and age. Given the opportunity to foster the tradition of philosophical liberalism, which at its best has attempted to open to as many people as possible the right and privileges of being, and of being regarded as, human, the Supreme Court has become, in fact, reactionary and obscurantist. It has decided to narrow the human community rather than expand it—contradicting in the process the liberal spirit and the liberalizing movement in history. It has taken a giant-step backward to the "dark ages" when *only* might makes right." In so doing it has denied its own traditions. A curious reversal, indeed!

It has now forged a tradition new to western jurisprudence that creates a whole class of "outlaw," in the sense of those who are beyond the protection of the law, denying them even the protection of the "mark of Cain." In making "discrimination on the basis of physical dependence" the "law of the land" it has reversed the position of very recent Court tests on discrimination and thereby has made those who are physically dependent (the un-

born, the retarded and the senile) subject to the "tolerance" of the society as regards their right-to-life. They have seen fit to rewrite the Declaration of Independence to the extent that inalienable rights no longer have the Creator as their source. These rights are now given by the State to those who are deemed "worthy" or "wanted." This can be done in the simplest way possible, by an *arbitrary* denial of personhood, precisely the same road that led to Auschwitz, Dachau and Buchenwald. How short our memories and deep our blindness! Private citizens now possesses the power of capital punishment based on whimsy, arbitrariness and convenience. An incredible reversal of western jurisprudential progress!

(2) Finally, the Poelker case does not really impinge on Roe vs. Wade, but on a seemingly ineluctable progression of thought, namely, that abortion is not only legal (Roe vs. Wade) but that government must provide it. This progression says that *all* citizens (whatever their conscience might dictate) must support abortion (through their taxes). The third step is even more automatic: doctors and nurses are citizens and will have to support the performing of abortions (through their skills). This, I believe, is the import of the recent Kentucky court finding against several nurses and doctors who refused to perform abortions. Remember, the licensing power is ultimately in the hands of the State. The Poelker case is important in terms of the conscientious right of the citizenry as a whole, and doctors and nurses in particular, to refuse to cooperate in *mandated* abortions. If gambling is legal in a given jurisdiction, must the government subsidize the poor so that they have equal access with the rich to the tables?

This has grown to impossible proportions and I had better just end. I wish you success in your fight for the

rights of the unborn and God's blessing on the effort. I hope the above may be of some use to you.

In Christ,

ROBERT BRUNGS, S.J.
Director: ITEST

RAB:bem

EXPLANATION OF GAP IN THIS BRIEF

(At This Point, There Is a Major Gap in the Completion of This Brief for the Reason That It Is Now 12:15 A.M., August 19, 1976 and Counsel for Amici, Working With Four Professional Secretaries, One Starting Wednesday, August 18, 1976 at 8 A.M., Mother of Six Children, One a Kelly Girl Earning Tuition Money to Continue Her Studies in Music at Forest Park Community College, St. Louis, Missouri, Starting at 8:30 A.M., Wednesday, August 18, 1976, and Another After Working a Full Eight Hour Day at Her Regular Employment Starting at 7:30 P.M., August 18, and Still Another Mother of Six, Starting at 7:00 P.M., August 18, Are Exhausted and Must Take up Their Daily Tasks Between the Hours of 6:15 and 6:45 A.M. This August 19, 1976 and Therefore Cannot Be Expected to Stay at This Task Without Jeopardy to Their Families, Other Obligations and to Their Health. It Is Further a Fact That the St. Louis Law Printing Company on Advice of Mr. William Hood, Sr., Late This Afternoon by Phone, Indicated He Must Have a Completed Manuscript of Not More Than Thirty to Forty Pages at His Shop No Later Than 8:00 A.M. This Morning August 19, 1976 to Complete the Printing of This Brief for Delivery and Filing With the Clerk of This Court, August 20, 1976, According to Present Advice of Said Court.)

Finally, the Equal Protection necessarily involves a sanction which cuts several ways. In emphasizing the distinction between a constitutional right and a claim to socialization of that right, the reflection of Justice Black is especially pertinent:

> Nor does a grant to the People of the right to assemble, to speak, or to write carry any inference that the government must provide streets, buildings, or places to do the speaking, writing, or assembling.[1]

The differentiation becomes critical in a sensitive and controversial matter of exacerbated public controversy seen by many protagonists therein as involving the genocide of the most innocent and defenseless members of the human race—a view asserted from avowedly non-religious perspectives (See Exhibit I) and adopted as the public policy of the financially beset community (See Exhibit II) whose subsidization as sought for abortion on demand and where affirmance of the decree below would, in a monstrous perversion of the establishment clause, implicate every St. Louis wage-earner[2] as a formal and material participant in the abortion process to a degree and in an intensity which "exceeds by far the 'three pence' which Madison condemned in his remonstrance."[3]

CONCLUSION

For all the above reasons, Points raised in Petitioners' application for the Writ of Certiorari, 1., 2. and 3., at page 3, thereof,

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[1] Black, *A Constitutional Faith* (1968) 60. See also Cox v. Louisiana, 391 U.S. 536, 539 (1965), Black, J. concurring.

[2] Revised Code of the City of St. Louis (1960), Chapter 145. An income "earnings" tax is a major component of the city's revenue.

[3] Douglas, J. dissenting in Lemon v. Kurfzman, 411 U.S. 192 (1973).

ought to be decided in favor of Petitioner. *Viutch, Roe v. Wade* and *Doe v. Bolton*, the recent "Seminal" precedent opinions of this Honorable Court ought to be reversed outright in favor of the Sanctity of LIFE, of the Sanctity of the CONCEPTUS.

ROBERT E. RATERMANN
11232 Bellefontaine Road
St. Louis, Missouri 63138

Also:

3701 Lindell
St. Louis, Missouri 63108
Attorney for Amici

REQUEST OF AMICI FOR LEAVE TO PARTICIPATE IN THE ORAL PRESENTATION AND ARGUMENT WHEN CASE IS DOCKETED TO BE HEARD

Amici request herewith leave of this Honorable Court to appear by counsel to participate as this Court may permit, in the oral presentation of this case when it is docketed to be heard.

MOTION OF AMICI HEREIN BY COUNSEL FOR LEAVE TO FILE ADDITIONAL BRIEF MATERIAL AND APPENDIX MATERIALS

In the light of counsel for Amici's letter of August 12 motion for time and Note 1 of brief, Amici moved by counsel for leave to file additional brief material and appendix materials on the grounds:

1. This brief has had to be put together in approximately three days under extremely difficult working circumstances.

2. Amici, by counsel have considerable additional material which they feel ought to be in the argument on the three points mentioned in Petitioner's Application for the Writ of Certiorari. Amici believe, in their relationship to the Court, that it ought to have before it such additional material for sound judicial consideration in reaching its decision.

WHEREFORE: Amici pray the grant by this Court, either according to rule, or suspension of rule, or some additional time in the discretion of the Court, to file supplemental brief material and appendix materials.

ROBERT E. RATERMANN
Attorney for Amici
In Support of Petitioners

State of Missouri }
City of St. Louis } ss.

CERTIFICATE OF SERVICE

I, Robert E. Ratermann, Attorney for certain Amici Curiae: Persons and Organizations, Social Workers for Life in support of Petitioners, being a member of the Bar of the Supreme Court of the United States, due hereby certify I have caused a true and correct copy of the foregoing brief to be served upon Petitioners and Respondents, they being all the parties of record by depositing such motion in a United States Post Office mailbox, with first-class postage prepaid addressed to Frank Susman, Esq., at his office of record, Pierre Laclede Center, 7733 Forsyth Blvd., Suite 1100, St. Louis County, Missouri 63105, Attorney for Respondents; Jack L. Koehr, City Counselor of the City of St. Louis, State of Missouri and Eugene P. Freeman, Deputy City Counselor of the City of St. Louis, State of Missouri, Room 314, City Hall, 1200 Market Street, St. Louis, Missouri 63103, Attorneys for Petitioners, this 19th day of September, 1975, and Jerome M. McLaughlin, Esq., at his office of record, 1930 Boatmen's Bank Building, St. Louis, Missouri 63102, Attorney for Amici, Missouri Doctors for Life, in support of Petitioners.

ROBERT E. RATERMANN
Attorney for Amici
In Support of Petitioners

APPENDIX

EXHIBIT 1

Commentary, December, 1975

TO: UTILITARIAN MAN

Do you see yourself as "God"?

Abortion doesn't solve the problems of society; only self-sacrifice and love can create a world of true humanity.

This is our message of hope. Give life, not death. . . . Life is always the answer.

NON-SECTARIAN COMMITTEE FOR LIFE

BOX 1234 MOUNT VERNON, N.Y. 10551

EXHIBIT II

OUR UNBORN CHILDREN LET THEM LIVE

Any society that denies the right of human beings to live—
will soon become its own executioner.

NON SECTARIAN COMMITTEE FOR LIFE
Box 1234 Mount Vernon, New York 10551

From Commentary, Volume Sixty-two, Number One, July 1976.
Commentary is published monthly by the American Jewish Committee,
Editorial & Business Offices: 165 E. 56th St., New York, N.Y. 10022

EXHIBIT III

Resolution Number 16 Adopted May 22, 1975

BE IT RESOLVED THAT the Board of Aldermen of the City of St. Louis respectfully applies to the Congress of the United States to call a convention for the purpose of proposing the following article as an amendment to the Constitution of the United States:

Article

Section 1. With respect to the right to life, the word person as used in this article and in the Fifth and Fourteenth Articles of Amendment to the Constitution of the United States applies to all human beings irrespective of age, health, function or condition of dependency, including their unborn offspring at every stage of their biological development.

Section 2. No unborn person shall be deprived of life by any person; provided, however, that nothing in this article shall prohibit a law permitting only those medical procedures required to prevent the death of the mother.

Section 3. The Congress and the several states have power to enforce this article by appropriate legislation.

BE IT FURTHER RESOLVED THAT a duly attested copy of this resolution be immediately transmitted to the Secretary of the Senate of the United States, the Clerk of the House of Representatives of the United States, to each member of the Congress from this state, to the Governor and Lieutenant Governor of the State of Missouri.

Introduced this 21st day of May, 1975 by:

YES—20

Paul J. Simon
President and Aldermen
Cornelius M. Carroll
2nd Ward
Delores Glover
3rd Ward
Raymond Leisure
7th Ward
Thomas A. Connelly
8th Ward
Lawrence E. Fuerst
9th Ward
James E. Geisler
10th Ward
Albert Villa
11th Ward
James Komorek
12th Ward
Albert J. Holst, Sr.
13th Ward
Richard A. Gephardt
14th Ward
Leonard H. Burst
16th Ward
Frank C. Boland
17th Ward
Eugene O. Bradley
21st Ward
Nellene Joyce
23rd Ward
Alfred J. Giuffrida
24th Ward
Milton F. Svetanics, Jr.
27th Ward

NO—6

Bruce T. Sommer
6th Ward
Samuel Kennedy
18th Ward
Richard Singleton
19th Ward
Lawrence E. Woodson
20th Ward
Lerel Stewart
22nd Ward
Mary Stolar
25th Ward

———

John G. Roach
28th Ward-Excused
Wyman F. Smith, III
26th Ward-Absent
Milton F. Svetanics
27th Ward-Absent

Jo Anne Wayne
1st Ward
Geraldine Osborn
15th Ward
Daisy McFowland
4th Ward
Ernestine Hinton
5th Ward

TOTALS: 29 Constituting the Full Board Membership.

EXHIBIT IV

Chapter II

Comments on the Supreme Court decision re: citations from Catholic theologians, by Father Peter Damien Fehlner, O.F.M., Conv. S.T.D.

In matters of historical interpretation there is always room for differing reconstructions. What I have tried to show is that the construction placed on the history by the Supreme Court is rather implausible, and in fact is based on inadequate knowledge of the sources, and what seems to me to be shoddy scholarship barely disguised by a veneer of learning. In any case the doctrinal authority of Augustine and Thomas cannot be used honestly to support the position of the Supreme Court. Indeed the contrary is the case. Further the attempt to make the Catholic position depend on something like a theory of mediate quickening is to misunderstand the entire 2000-year-old tradition. Finally the identification (is it deliberate confusion?) of the question of intrinsic malice with the problem of appropriate penalty, of the internal and external forum in the Church and the relation between ecclesiastical and civil jurisdiction in various times underscores other dimensions of this problem. The implication (as

it seems to me) in the thrust of this argumentation that absence of penalty is equivalent to permission or possibility of permitting, legally supposes a theory of law (nominalistic) that is thoroughly secular, a position always rejected by the Church, because totalitarian and idolatrous.

It appears the scribe for this decision leaned on Noonan's first essay heavily. I doubt that Noonan would agree with the use made, but I also think he inadvertently opens the door to conclusions inimical to his own. The work of Huser, cited by the decision, but apparently not very influential in it—(was it actually read?) is useful and can be found in series of Canon Law dissertations of CUA, no. 162, R.J. Huser, The Crime of Abortion in Canon Law (Wash. 1943).

1. Thrust of argumentation in explanation of decision: to show that abortion is not something that has been forbidden absolutely because intrinsically evil, but has been variously permitted and prohibited in accord with legal definitions and public consensus as to its utility or harm. For this view numerous precedents are cited, including eminent representatives of Catholic doctrinal position such as Sts. Augustine and Thomas, who if they do not approve of abortion furnish grounds for permitting it by way of the teaching or mediate animation or quickening of the soul. From this point the medieval cannon and common law are interpreted as allowing at least the possibility that abortion in all instances is not homicide, and therefore not a crime.

2. Critique

a. Scholarship: I suspect that a good deal of this explanation is simply a selection of texts from secondary authors that appear to fit a conclusion already adopted on other grounds. The only citation from St. Augustine (note 22, 93, S. Ct. p. 717) is one of three given by Noonan, An Almost Absolute Value in History: in Noonan, The Morality of Abortion (Cambridge, Mass.

1970) p. 15-16, Noonan cites it as De Origine Animae, PL 44. 527). The correct title in Migne is: De anima et eius origine. PL (PL is the abbreviation for Migne, Patrologia Latina) in the hands of the Supreme Court becomes Pub. Law 44. 427, a rather odd misprint, probably a tattle tale sign of ignorance. A better selection for this discussion might have been Quaestiones in Heptateuch, Lib. II, Quaestiones de Exode, ¶ 80, (PL 34.626) also cited by Noonan, and which contains the classic passage later inserted in the Decretum Gratiani to which the Supreme Court refers in this note. Had the anonymous scribe read the single page 15 of the book of Huser which he cites, his note might have been considerably improved as regards the selection of augustian texts. As regards St. Thomas: no text references are given. Had the scribe read on a few pages (pp. 23-24), in the essay of Noonan he cites, he might have found a few handy ones to use as footnote decoration. Unfortunately, as Noonan makes so clear, St. Thomas commenting on St. Thomas' concept of mediate quickening and on abortion leaves no doubt as to the latter's intrinsic evil. Perhaps that is why no text is quoted. As regards the passing allusion to St. Thomas on movement as a sign of animation, one must comment that this is hardly original. Movement was regarded as a possibly valid empirical indication of life (I suspect it still has some use in this regard). St. Augustine mentions it in this connection in the text above from Quaes. in Hepta. But all of these doctors regarded this as indicative, no probative of the theory of mediate quickening.

b. Content of the argument may be attacked on the following grounds:

1. Complete ignorance of the basic reason always given in the Judeo-Christian tradition for the evil of abortion: contrary to the nature of generation, which means in the minds of the Fathers contrary to the goodness and justice of the Creator and his absolute rights over the giving and taking of human life from conception. In this tradition the moment of conception is the be-

ginning of human life, and the point at which any attempt to destroy that life is defined as abortion. The lack of exactitude in establishing empirically the moment of conception sometimes led to a confusion of what we would call contraception with abortion or visa-versa. In any case both were regarded as intrinsically evil because both contrary to nature (as defined above) in the same way. The clear distinction between contraception and abortion, a contribution of Augustine, as well as his distinction between abortion before quickening and after, was intended to be used and was used till the Supreme Court decided otherwise, to define the specific malice of different acts, not in view of showing that in certain circumstances they might be morally good; and to determine the appropriate penance or penalty. This in fact is the point at issue in the citation from Exodus commented on by Augustine—how explain the different penalties mentioned by Exodus for the same crime of abortion before and after animation. For this the theory of mediate animation is useful. But Augustine himself only proposes this as an exegetical hypothesis, which in no wise can be used to excuse abortion. In fact August in his Enchiridion, 85-86 (PL 40. 272) regards abortion committed before animation as worse for the child and therefore more sinful than that committed after quickening (because A. thought no resurrection possible unless one died and one could not die unless there were a soul to be separated from the body). All of this, however, in no wise permits anyone to cite Augustine as providing grounds for permitting abortion. Like all the contemporary Fathers of the Church, and in conformity with the canonical discipline of the Church from its origins to the Decree of Gratian, he regarded abortion as homicide, at whatever time of fetal development from conception abortion might have occurred. (Cf. Noonan, p. 16, n. 40, where he criticizes the views of Gonzales only on the single point that Augustine never actually said abortion before quickening was homicide. But neither did he say it was not. Like Ambrose, his teacher, Aug. simply called abortion murder, which in a classic passage from De Nuptiis et Concupiscentiis I, 15.17 [PL,

44.47-43, 44.] has its origin in lust, that normally shows itself in the form of sterilization or contraception, and finally in that cruelty known as abortion.)

2. Mediate Quickening or Animation: The theory (and Augustine, as every great Catholic theologian after him who proposed it, held it only as a tentative hypothesis, to be modified or abandoned either in view of revelation or better empirical evidence concerning the moment when soul and body are united) was first taken up by Augustine in connection with the problem of the origin of the soul (by direct creation or by generation or tradition from the parents). Augustine did not seem to be certain of the final resolution of the question, though he appears to have leaned toward creation later in life. Subsequently the question was resolved in terms of creation of the soul. The problem of mediate or immediate quickening (whether the soul was united to the body at the moment of conception or at some later point in fetal development) was left an open one. St. Augustine also used the theory as a means of resolving an old testament exegetical problem (Exodus—cf. supra). It is important to note that this theory is employed as a way of explaining the diversity of penalties for abortion committed at earlier and later stages of pregnancy, and is only proposed as a theory. Second, it is never employed in conjunction with the question of the intrinsic malice of abortion, which for Augustine is beyond question, and as far as can be determined is simply the same as murder, whenever committed. Augustine never produced a systematic theology in the modern sense. To argue as does our Supreme Court that lack of total consistency in explanations and hypotheses proves doubt on another point otherwise clearly affirmed as certain is to misunderstand grossly the nature of theology and to abuse the doctrinal authority of Augustine.

3. To question the advisability of punishing abortion as a crime, or to question the advisibility of differing penalties for different persons or circumstances is not identical with the question of

the malice of the act or of its radically criminal character. Or—That abortion need not be punished in civil or canon law in each instance or in the same way in every case is not equivalent to saying it may be permitted. And when in the late middle ages and early renaissance the possibility that abortion in all circumstances might not be intrinsically evil (because canon law between Gratian and Sixtus V only imposed penalties for abortion after quickening) was proposed, the Church responded by reaffirming the absolute prohibition and by commencing with Sixtus V to extend the canonical penalties to abortion committed at any stage of fetal growth, and finally with Pius IX (1869) of ignoring the question of mediate quickening altogether as a useful means for assigning penalties.

To understand this in context a bit of history if necessary. In the earliest canons of the Church (cf. work of Huser for convenient summary) which antedate Augustine, all abortion is equally condemned with the same severe penalties as reserved for murder. Later the severity of these in some cases, especially in regard to the mother, was reduced, but the basic principle was retained: abortion and murder are the same, and the penalties for each the same. Once interest in the specific differentiation of sins in view of an appropriate penance for each, and then in view of an analysis of the conscience of the penitent had taken root in Europe as a result of Irish missionary efforts (by A.D. 800), it was but a matter of time when someone would cite that text of Augustine on Exodus as a precedent for differentiating the relative malice of various sins of abortion, and the relative penalties attached thereto. The theory of mediate quickening thus came to be incorporated in the Decree of Gratian (12th century): abortion after quickening was punished with the penalties reserved for murder. Before quickening no penalty was imposed by canon law, i.e. for the external forum. The penance was to be assigned by the confessor in the internal forum. Further, until the last part of the middle ages, in the Christian policy then in force, the Church reserved cases of abortion to herself,

so that in practice whatever might be found in common law, or statutory law, but reflects the position of canon law and the moral theology standing behind it: in this case abortion is simply evil. This is quite clear from the theology of the 13th century. No theologian that I know of (i.e. reputable one), least of all St. Thomas hints, let alone says, that mediate quickening has anything to do with the evil of abortion, but only with the question of whether it should always be punished as murder. (Had our scribe read on a bit further in the essay of Noonan from which he seems to have copied or miscopied his references, he would have found the position of Thomas clearly stated.) St. Thomas holds that abortion can never be performed, no matter what good it effects, because it is always an evil means forbidden for the same reasons given by the Fathers. The theory of mediate quickening only explains why abortion before quickening is not murder strictly speaking. But because the theory of mediate quickening is not certain, and because the fetus before quickening already comes under the divine and natural law concerning men, such abortion came to be known as "anticipated" murder by the later followers of St. Thomas.

4. Because abortion was not punished in all instances in the external forum by canon law does not mean that it was permitted by law of canonically legal, nor does it imply that abortion was frequent in those days. But there is no denying that toward the end of the middle ages it did increase in frequency. Far from legalizing abortion as the solution (as the Supreme Court scribe seems to imply should be the logical consequence to be deduced from this development), the Church extended the penalties of canon law to abortion to all stages. (Sixtus V, Effraenatum).

At the same time theologians were once again questioning the certainty of the theory of mediate animation. In the case of the human nature of Christ, orthodox theologians who admitted the hypothesis as having a validity, had always posited

an immediate animation of the body of the Savior by way of a miracle at the moment of conception. For it was a canon of dogmatic theology that the Word at the moment of conception assumed a complete human nature, not body first and then soul. When the Franciscan John Duns Scotus proposed his explanations of the Immaculate Conception of our Lady, immediate animation had to be assumed, for only a soul can be filled with grace. A second miracle might be invoked in explanation, but the scotists soon came to question the need for this. For if immediate animation were the norm (and they could find no empirical evidence but only the authority of Aristotle contrary to this absolutely), then not only the Immaculate Conception consistently understood. And if this were so, then eventually it would be logical to return to the ancient canonical position re: the punishment of abortion—i.e. all abortion is murder as a specifically distinct category of sin, because it involves separation of soul and body, i.e. death in the strict sense. What is interesting in all this discussion of specific differences of sin is that the theory of mediate animation never leads anyone to doubt the intrinsic dignity of the living human being, i.e. from conception, whether animated or not, formed or not. The question of animation decides not whether abortion is evil, but what kind of evil. The Supreme Court version of history very conveniently obscures all this.

The Franciscan theology in those centuries had more adherents perhaps than the thomist, and it was propagated in popular terms by a host of preachers of the Order. And while it is true that many still followed the theory of mediate animation, the grounds for another logic had already been laid. Sixtus V, himself a famous Franciscan theologian, neither affirmed nor denied the theory of mediate animation. He simply revised canon law in a way that coincided with logic of Scotus and the needs of the time for penalties to control the increasing frequency of abortion before "quickening". Some of the immediate successors of Sixtus as Pope modified the severity of his

prescriptions, but the essential point remained, all abortion would be punished in canon law.

5. In the 15th and 16th centuries common law and statutory civil law began to be concerned more frequently with the problem of abortion—principally to control and punish it. At first this seems to have come about because the secular arm was useful and necessary in enforcing the decisions of ecclesiastical courts. But the erastian theories of the later Renaissance and then the Protestant revolt tended to take the problem out of Church courts and put it in the civil ones. During the 16th century the question of therapeutic abortion, i.e. to save the life of the mother began to be raised as something permissible under certain circumstances and at certain stages of fetal development. Within Catholic circles the question was resolved by introducing the principle of double effect. Direct abortion was never allowed; indirect abortion might be permitted in certain circumstances. In any case abortion in strict sense (direct abortion) was always declared evil by Holy See when queried. Innocent XI (1679) condemned the contrary view. Noonan in the essay cited earlier summarizes the subsequent discussion in Catholic circles down to Casti Connubii. He analyses this as a weighing of values, which to mind is an unsatisfactory presentation. It leaves the impression that abortion in some sense is permissible. It might be more helpful to note (as with direct and indirect sterilization) that we are dealing with two different moral acts from an objective point of view. One is intrinsically evil, the other is neutral. Perhaps a different name in the vernacular for indirect abortion would be better. In any case the need of indirect abortion to save the mother has been progressively reduced through the advances of medical science, indirectly confirming the wisdom of the Catholic tradition. One may argue in specific instances that it is difficult to distinguish direct and indirect abortion. This does not affect their real difference, or the possibility of distinguishing in most cases.

The same problem was raised in the 16th century in non-Catholic circles concerning therapeutic abortion. Some tried to forbid it entirely; others wished to permit it. The latter prevailed in fact especially in the 19th century when stricter antiabortion laws were enacted. But since the Protestant world did not accept the principle of double effect, and the civil law was no longer influenced by developments of Catholic theology subsequent tc the Reformation, the distinction of direct and indirect abortion in relation to therapeutic abortion is not reflected in our civil law. This seems to me one explanation of the famous or infamous exception that Catholics reject and Protestants contrary to abortion accept. For the rest the use of the theory of mediate quickening in English and American law after the Reformation reflects medieval antecedents outside their proper context, i.e. inspired by the divinely instituted tradition of the Church. This is a capital point in the evaluation of the Supreme Court's interpretation of history—far from proving continuity of development from ancient times to ours in terms of a theory of abortion based on legal permission or prohibition, the history reveals gaps between Catholic views and those of others. The Catholic tradition does not form a part of or a basis for the decision of the Supreme Court.

6. Recently Fr. Donceel, S.J. in Theological Studies has tried to rejuvenate the theory of mediate animation in the context of the abortion controversy, with—so it seems to me—the ultimate purpose of raising questions concerning the basis of the Catholic position against abortion (something St. Thomas never appears to have done with the theory). I am personally unconvinced by the efforts and believe the theory of immediate animation still holds the field in theology. In any case the dignity of the human being from conception rests not as a theory of quickening, but on the eternal law and natural law as perfected by Christ. Abortion, like contraception, is contrary to nature, where nature means not in the first instance the infra-human, but the personal and supra-human in God. In view of this, thomist

moralists who held for mediate quickening have also held that abortion before quickening in practice must be related to murder, and that since abortion involved the rights of a person and ultimately the possibility of salvation, a probable theory such as this one could not be invoked to resolve difficult cases. For in matters of justice and salvation theories of probabilism had no bearing—one is always obliged to act in accord with the safer opinion. Oral Arguments in the Supreme Court Abortion Decision, Chapter II, "SANCTITY OF LIFE" publications, ltd., Vol. 1, Jun. 22, 1976, First Edition, printed by Gateway Press, Inc., St. Louis, Mo.

EXHIBIT V

Resolution No. 2458, 1975

Introduced by Councilmen Butler, Bischof and Breihan

RESOLUTION

WHEREAS, medically and scientifically a human embryo or fetus exists as a living and growing human individual from the time of conception; and

WHEREAS, human life is a continuum and the moment of birth represents merely an identifiable point along the course of human development and not the beginning of human life; and

WHEREAS, respect for human life has been a hallmark of civilized society for millennia; and

WHEREAS, respect for and protection of unborn human life has been traditional with the medical profession since long before the beginning of the Christian era regardless of prevailing political, religious or social ideologies or dogmata; and

WHEREAS, a legal threat to the right of life of any individual member of a society imperils the right to life of every other member of that society; and

WHEREAS, there is ample legal procedure regarding legal rights of the unborn; and

WHEREAS, in States in which abortion laws have recently been relaxed or repealed, professional medical ethics and respect for unborn human life has proved to be wholly inadequate for the reasonable protection of the lives of the unborn; and

WHEREAS, Public Health and Hospital Services should not be used for social purposes such as abortions rather than for health services; and

WHEREAS, the United States Supreme Court has withdrawn all legal protection from an entire class of human beings, namely, the unborn; and

WHEREAS, the United States Supreme Court has gone far beyond its judicial authority by exercising legislative functions;

NOW, THEREFORE, BE IT RESOLVED BY THE COUNTY COUNCIL OF ST. LOUIS COUNTY, MISSOURI, AS FOLLOWS:

38-147

SECTION 1. That the Congress of the United States take appropriate action toward amending the Constitution of the United States establishing that human life with legal personality begins at the time of conception, and that all constitutional rights, including due process of law, apply to the unborn in the same manner and to the same extent as to all other citizens of the United States.

SECTION 2. That the Administrative Director of the St. Louis County Council is directed to transmit a copy of this Resolution to the President of the United States, to the President of the Senate of the United States, to the Speaker of the House of Representatives of the United States and to each member of Missouri Congressional delegation, to the Governor of the State of Missouri, to the Lieutenant Governor of the State of Missouri, to the Speaker Pro Tem of the Senate of the State of Missouri, to the Speaker of the House of Representatives of the State of Missouri, to the Supervisor of St. Louis County.

Adopted July 17, 1975.

Carl W. Breihan
Chairman, County Council

Attest: Lela Apperson
Deputy Administrative Director

State of Missouri
St. Louis County

I, James H. White, County Clerk in and for said County, hereby certify the above and foregoing to be a true copy of the proceedings of our said County Council, on the day and year above written as the same appears on record in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said County at office in Clayton, this the 18th day of August, 1976.

James H. White
County Clerk

By Lela Apperson, D.C.

Recorded in the Journal of the St. Louis County Council, July 17, 1975, pages 717 thru 720.

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